no materials before us to justify us in holding that it must be separated so as to send the claim as regards this larger part of the premises to arbitration, and as regards the attic flat to the Sheriff. The claim alleged is for injury to the respondents' interests as occupiers of the hotel as a whole, and I think the Lord Ordinary puts his decision on this point on the right ground when he says that "it cannot be affirmed of the claimants' interest in the premises to which their claim applies, that it is an interest not greater than that of yearly tenancy."

But then it is said that if the respondents are not tenants they must be proprietors, and that the owners from whom they purchased having, with their consent, made a separate claim, which the arbiters have already disposed of, they cannot now be allowed to maintain the same claim for themselves. This resolves into a plea of bar, because it is obvious that it is no answer to the respondents' claim to say that the compensation they demand has already been paid to somebody else, unless they are themselves responsible for such payment having been made. But the claim made by the Heritable Investment Company with the respondents' concurrence is a claim for structural changes, or as it is stated in their more specific claim, for permanent injury and depreciation. That is a claim quite separate and distinct from the claim of the respondents. There is nothing inconsistent in their position when they consent to the compensation exigible for permanent injury to the structure being paid to the Heritable Investment Company and not to them, and at the same time insist on their own claim for disturbance of their business and injury to their interest not as owners but as occupiers for the time. It must also be observed that their notice of claim as occupiers had been served upon the complainers before the notice of the Heritable Investment Company as owners; and that the nomination of arbiters by the complainers was made for both claims on the same day. It cannot therefore be maintained that the complainers were in any way misled by the respondents' concurrence in the claim of the owners so as to alter their position to their prejudice; and if not, there is nothing in the respondents' conduct to give rise to a plea in bar. If in fact any ground of compensation which may be included on the respondents' claim has been already taken into account in determining the owners' claim, it will be for the arbiters to consider what effect should be given to that circumstance. But nothing of the kind is alleged on record, and if it were, it would not be a reason for stopping the arbitration by interdict. The point, if it arises, is more suitable for the arbiters than any other tribunal.

In what I have said I am not to be understood as expressing any opinion on the merits of the respondents' claim. That is a question for the arbiters. But I am of opinion that no sufficient ground has been stated for interfering with the arbitration, and that is all that it is necessary for us to decide.

The LORD PRESIDENT, LORD ADAM, and LORD M'LAREN concurred.

The Court adhered.

Counsel for the Complainers — Clyde—Deas. Agents—Hope, Todd, & Kirk, W.S.

Counsel for the Respondents — Vary Campbell—W. Thomson. Agent—

Friday, June 10.

SECOND DIVISION.

[Lord Kincairney, Ordinary.

BRUCE'S TRUSTEES *v.* BRUCE.

Succession—Terce and Jus Relictæ—Election Between Legal and Conventional Provisions—Forfeiture of Conventional Provisions in Event of Re-Marriage.

A husband died leaving a trust-disdisposition and settlement whereby he conveyed his whole means and estate to three trustees, including his law-agent and his wife, to be held by them for behoof of his widow in liferent as long as she survived and remained unmarried, with an obligation on her to maintain and educate the children of the marriage, and for behoof of the children in fee. It was declared that these provisions were to be in full of terce, *jus relictæ*, and legitim, and that the widow, if she married again, was to forfeit her provision under the will.

The testator was survived by his widow and two children aged sixteen and thirteen. The trustees accepted office, and the truster's law-agent acted as law-agent under the trust. Three months after her husband's death the widow signed a deed prepared by the law-agent, electing to take the provisions in the trust-settlement. In making her choice the widow had no separate legal advice, but derived her information from a written statement prepared by the law-agent to the trust, which did not set forth the following facts—(1) that if she elected to take her legal rights she would also receive an annual sum for the maintenance of the children; (2) that her testamentary liferent would be diminished if the children demanded their legitim on attaining majority; and (3) that the largest item of the estate, which consisted of shares in a prosperous industrial company valued in the statement at £12, 10s. and yielding about 13 per cent. on this valuation, might be valued by others at a much higher figure.

Two years and a-half after the death of the testator, the trust-estate being still intact, the widow brought an action to reduce the deed of election signed by her, and during the dependence of this action she married again.

Held that the deed of election fell to be reduced (1) because the election had been made at too early a date after her

husband's death for the pursuer to appreciate the importance of the conditions attaching to the testamentary provisions in her favour, and in particular the condition forfeiting the provision in the event of her marrying again, while there was no necessity for a hasty election; and (2) because the pursuer, when making her election, had no independent legal advice and no adequate information as to the comparative value of the legal and conventional provisions.

On 7th September 1897 Mrs Hannah Barbara Storrier or Bruce, widow of William Keiller Bruce, wholesale confectioner, Dundee, raised an action against John Mitchell Keiller, wholesale confectioner, Dundee and London, herself, and William Walker Stephen, Solicitor, Dundee, trustees and executors of Mr Bruce, who died 19th March 1895, under his trust-disposition and settlement dated 11th March 1882, and codicil thereto dated 22nd September 1893. In this action she sought, *inter alia*, the reduction of a deed dated 14th June 1895, whereby she elected to take the provisions in her husband's settlement instead of her legal rights of *jus relictæ* and terce in his estate.

The pursuer pleaded, *inter alia*—"(2) The said deed of election ought to be reduced in respect that it was executed by the pursuer without independent legal advice, and without adequate information in regard to her legal rights. . . . (4) The pursuer not having validly and irrevocably elected to accept the provisions in her favour contained in the said trust-disposition and settlement, the defenders as trustees of the late William Keiller Bruce are bound to hold count and reckoning with her in order that the amount due to her as *jus relictæ* and terce may be ascertained."

The defenders pleaded, *inter alia*—"(3) The pursuer having validly elected to take her conventional provisions, and having enjoyed these as condescended on, is not now entitled to recal said election, or to any accounting for terce and *jus relictæ*. (4) The deed of election libelled being the free act of the pursuer, with full knowledge of her rights and of the facts, and *separatim* not being to the pursuer's prejudice, the defenders should be assoilzied."

The Lord Ordinary (KINCAIRNEY) allowed a proof. The circumstances of the case, so far as they concern the legal points involved, are fully set forth in the opinions of the Lord Ordinary and the other judges.

On 25th February the Lord Ordinary pronounced the following interlocutor:—"Finds that the deed of election libelled was not executed by the pursuer under circumstances in which she was able to appreciate or estimate the conditions attaching to the testamentary provisions in her favour: Further sustains the pursuer's second plea-in-law, and reduces, decerns, and declares in terms of the declaratory and reductive conclusions of the summons, and appoints the cause to be enrolled for further procedure, reserving as to expenses meantime."

Note.—"The pursuer seeks by this action to reduce a deed whereby she elected to take the provisions in her husband's settlement instead of her *jus relictæ* and terce. There are further conclusions the object of which is to ascertain the amount of her legal rights; but the parties agreed that the proof should not extend to these latter conclusions, but only to the question raised by the first conclusion, which is, whether the deed of election is irrevocable and irreducible, or whether in the circumstances the pursuer can be restored against it.

"Mr Bruce and the pursuer were married in 1878. There was no marriage-contract. There are two children of the marriage, now aged eighteen and fifteen. Mr Bruce died on 19th March 1895. He left a trust-disposition and settlement, dated 11th March 1882, whereby he conveyed his estates to the pursuer, his widow, John Mitchell Keiller, wholesale confectioner, Dundee, and Mr Stephen, a solicitor in Dundee, as trustees. He appointed them to pay to his widow, the pursuer, the annual proceeds of his estates, and also his 'household furniture, books, oil and water-colour pictures, engravings, photographs, silver plate, wines, liquors, and bed and table linen,' declaring that these provisions should be in full to her of terce and *jus relictæ*.

"The deed contained this provision—'Declaring also that the provision of said net annual proceeds . . . shall cease and determine and become null and void in the event of her marrying again after my death, saving to her nevertheless whatever she may have received from my said trustees during her viduity.'

"The truster provided that in respect of these provisions his widow should maintain and educate the children.

"The third purpose contains somewhat elaborate provisions for the children of the marriage, in full of 'legitim, executry, and every other claim,' but it is not necessary for the purposes of this case to advert further to these provisions. The trustees under the deed are curators of the children. The truster grants power to sell and to invest, and in particular, by a codicil executed on 22nd September 1893, he specially authorises his trustees to retain unrealised and to hold as investments any shares standing in his name in the books of James Keiller & Son, Limited. There are no legacies at all. Mr Bruce died quite unexpectedly, and apparently accidentally.

"The trustees nominated accepted as trustees and curators. Mr Stephen acted as agent in the trust. I have not observed any written appointment by the trustees, but he was no doubt agent as he himself depones, and the trust-deed contains express power to the trustees to appoint one of their own number as agent.

"The deed of election was framed by Mr Stephen, and was signed by the pursuer on 14th June 1895—rather less than three months after Mr Bruce's death. In making her election Mr Stephen was the pursuer's sole legal adviser. The pursuer was then thirty-nine years of age. Since her election,

and until a short time before the date on which this action was raised, 7th September 1897, the pursuer received and accepted the provisions in the trust-deed. She was married to Mr Stewart, who had been an intimate friend of her husband and herself, on 8th December 1897. That was after this action was raised, but I suppose there is no doubt (I have myself none) that the action was raised on account of her contemplated marriage, whereby she forfeits the liferent of her first husband's estate. In the rest of my opinion I shall for convenience speak of the pursuer as 'Mrs Bruce.'

"A proof of considerable length has been led, which, as I have noticed, is intended by the parties to bear only on the conclusion for reduction of the deed of election.

"The question raised is to my mind of very great difficulty, but it absolutely wants almost all those features and particulars which have made other cases of this class intricate and complicated, which this case is not, although it is difficult and narrow.

"In such cases one prominent question has often been whether the election was truly intended, but here it is by a formal deed as to the meaning of which no question has been raised. Further, in such actions questions have generally arisen as to the conduct of the trustees or their agent under whose guidance the widow has acted. Usually, or at least often, it has been said that he has acted unfairly, has misled her, and has exercised undue and unfair influence. In my opinion there is nothing whatever of that kind in this case. I have no doubt that Mr Stephen acted with a single and anxious desire for the benefit of the pursuer. I consider that his conduct as the pursuer's agent was unimpeachable, and I am happy to add that it has not been impeached. I am satisfied that he had no personal motives, and that he was not influenced, as may be insinuated, by any desire to stand well with his co-trustee Mr Keiller. It is true that Mr Stephen had more interests to look after than one. He was a trustee and agent for the trust; he was a curator for the children, and he was agent for the pursuer. But I doubt whether his duties in these several capacities could be properly said to be antagonistic, and I think he did not discern any antagonism. He did, indeed, take notice of his position, and he recommended the pursuer to employ another agent. He says (and I believe him) that he did so several times, but that she, having full confidence in him as a familiar friend of her husband and herself, always declined to do so. Whether Mr Stephen should not have taken a step further is another question. At the same time I doubt whether many agents would have done more or acted differently in the circumstances. Perhaps, looking back on the matter now, Mr Stephen may think that it would have been better had some things been done differently, as, for example, had he insisted on Mrs Bruce having independent advice. But that is a different matter, and I could not decide this case in favour of the pursuer if it were necessary for me, in order to reach that conclusion, to cast any blame on Mr Stephen.

"Again, questions arise in such cases as to the intelligence of the widow, and her capacity to understand her husband's affairs and her own position. I do not think there is any such question in this case. So far as I was able to judge, Mrs Bruce is an intelligent lady. She says that she has no head for figures. That may be so; many intelligent ladies have not. But it does not appear that any difficulty arose with regard to the figures laid before her. There was certainly a considerable difficulty of a different sort with regard to her husband's estate, and to that I will advert afterwards.

"On the other hand, doubts have arisen in such cases about the candour and straightforwardness of the widow. In my judgment there is no room for such doubts in this case. I think that Mrs Bruce was frank, candid, and truthful. I do not overlook that her evidence differed in some details from that of Mr Stephen, whom I consider also a highly reliable witness. But these discrepancies may be accounted for by the likely supposition that the pursuer may not have remembered, or perhaps fully appreciated, all that Mr Stephen said to her. They were on intimate terms and talked familiarly, and what he said might not have carried the same weight as if it had been spoken with the formality of an agent and stranger.

"It is quite clear also in this case—and this I consider a very important point—that there was no urgency whatever about the pursuer's election. It practically affected nothing but the payments to herself, and it would have been quite easy to have made such payments on a conditional and hypothetical footing. Mr Stephen himself seems to admit that the election might have been allowed to lie over for a year without inconvenience.

"Still further, matters are practically entire, and no inconvenience would be occasioned by permitting the pursuer to reconsider her election.

"These are the general circumstances in which the question arises, whether, having reference to the more detailed facts, the pursuer having married, and having thus lost her liferent, can be relieved from her election.

"The general question whether a widow's election, duly and deliberately made is irrevocable, or whether she can retract it *debito tempore*—that is, while matters are entire, has not, I think, been decided. The weight of authority is in favour of the view that her election is final, and that she has no *locus pœnitentiæ*. and I am not prepared to decide the reverse. Election by a widow or child between conventional and legal rights is a transaction which is, I think, of the nature of a contract constituted by offer and acceptance, although it is a contract and an offer and acceptance of exceedingly special and exceptional character. The

offer, for example, has the singular quality of being binding, and open for acceptance at any time, although there may be circumstances in which the widow and child may be held barred by *mora* from claiming the conventional provisions and confined to legal rights; I do not think, however, that there has been such a case. But generally I think that a widow might withhold her election so long as she did not thereby impede the execution of the trust. In *Keith's Trustees* v. *Keith*, 17th July 1857, 19 D. 1040, it was held that one of the parties, Mrs Villiers, was bound to make her election then, because, as I understand, upon her election the execution of an entail directed at that time depended. But I do not understand that it was laid down that in the general case a widow or child could be compelled to elect when there was no reason for urgency in the matter. It was plainly implied, no doubt, in the case of *Keith's Trustees* that the election would be irrevocable. In *Inglis* v. *Inglis*, 31st May 1887, 14 R. 740, in a question about legitim, Lord Trayner, Ordinary, expressed the opinion that if an election was well made and intimated it was out of the power of the party to withdraw it, and quoted in support of his opinion the case of *Scarf* v. *Jardine*, L.R., 7 App. Cas. 360, and an opinion by Lord Blackburn to that effect expressed in that case. The case did not relate to the kinds of election to be considered here. It was about the election of one of two debtors, but no doubt Lord Blackburn's dictum was general. It is necessary, however, to notice that in the Inner House this opinion was questioned by Lord Shand, and also, in perhaps more guarded terms, by Lord Adam.

"In the special case of *Dawson's Trustees* v. *Dawson*, 9th July 1896, 23 R. 1006, one of the questions was whether a widow was barred by election from claiming her legal rights, and it was held that it was not necessary in the circumstances to decide the question. But Lord Kinnear in delivering the leading opinion said—'If it could be shewn that she acted under a false impression as to the relative value of her legal rights and her testamentary provisions, it may be that she might still reconsider her position and revert to her legal rights, because nothing has followed upon her election which might not be easily undone so as to restore all parties to the same situation as if no benefit had been accepted under the will. . . . I know of no authority for holding that any express election which has been partly carried into effect can be recalled at pleasure, if it has been made not in ignorance or error but in the full knowledge of the existence and value of the abandoned right in comparison with that which has been accepted.'

"On the whole, I think that a widow in the general case cannot be restored against her election merely and solely because her interest has changed, and she has changed her mind, and because matters are entire, if there be no other reason.

"Does, then, the special clause by which the pursuer's liferent is forfeited on second marriage, which I suppose has really given rise to this case, make any difference? I am of opinion that it makes a great difference, and it makes it necessary to examine rather more closely the circumstances under which the election was made, with special reference to this point. Now, while Mr Bruce died on 19th March 1895, I find that on 19th April a state of the succession (to which I will advert more fully afterwards) was submitted to the pursuer 'for the purpose of enabling her to consider whether she would abide by the settlement or elect to take her legal rights. It was arranged that she should carefully consider the matter for a few days and afterwards inform the agents of her decision' [Minute, No. 26 of process]. She was, according to this minute, to have a few days for consideration. Why only a few days? Where was the hurry? There was nothing to do in the trust, there was nobody to be paid. Her election, if made then, would have been, and when made was, a merely barren election, binding and barring herself it may be, but having no other present effect.

"At this point it becomes of some consequence to attend to the communications between Mr Stephen and Mr Keiller, who was then in London, and it is necessary here to mention that Mr Keiller was much the largest shareholder in the highly prosperous and wealthy firm of James Keiller & Son, Limited, and had the chief influence in the management of it, and Mrs Bruce seems to have regarded him with some apprehension, because she hoped through his good offices to have her son placed in the business.

"On 30th May Mr Keiller writes Mr Stephen expressing his surprise that the pursuer had not decided. On 31st May Mr Stephen's firm write in reply that Mrs Bruce had apparently some difficulty in coming to a decision, and that they were 'unwilling to have even the appearance of hurrying her unduly, and intended to let her alone for perhaps a fortnight longer, had we not received your letter. . . . We trust, however, that she will see her way to abide by the will. The matter is delicate, as no one but herself can estimate the personal considerations.'

In the beginning of June Mr Stephen called on Mr Keiller in London on the business of the trust, and he brought back with him a memorandum that Mr Keiller was 'surprised and displeased that there should have been any hesitancy, but fully agrees that she must have her own time . . . must not be hurried.' On 11th June Mr Stephen writes that the pursuer had now quite decided to abide by the provisions of the will, and that for her sake, and for the sake of the children, he was glad to hear it. On 13th June Mr Keiller writes in reply—'The contents of your note of 11th inst. are so far satisfactory, and remove an uncomfortable dread.' On 14th June, as already mentioned, the deed of election was signed. From these letters it appears clearly enough that both Mr Stephen and Mr Keiller were desirous that Mrs Bruce

should take her conventional provisions, and that Mr Keiller was impatient about it. I do not doubt that Mr Stephen's desire and anxiety were chiefly, if not wholly, because he had a strong opinion that it would be greatly in Mrs Bruce's interests to accept the testamentary provisions. I am not sure that I see Mr Keiller's reasons so clearly. I think he had a feeling that Mrs Bruce's hesitation was disrespectful to her husband's memory, and that his feelings on the subject were mingled with some displeasure. Now, Mr Stephen did his best to leave Mrs Bruce to exercise her own judgment, with, no doubt, such friendly advice as he had to offer. I doubt whether his endeavour to conceal his own and Mr Keiller's wishes was successful. He submitted the question to her a month after her husband's death, and apparently reverted to the subject more than once, and it certainly does appear that Mrs Bruce received the impression that she would displease Mr Keiller, from whom she hoped and feared so much, if she did not abide by her husband's deed. I think it very likely that Mr Stephen had unwittingly allowed her to get a glimpse at least of what truly were Mr Keiller's feelings. Now, that being so, I think there is good reason to hold that the election was not Mrs Bruce's unbiassed act.

"A clause of forfeiture in the event of second marriage appears to me to be of great importance in considering the question of a widow's election, because for some time after a husband's death she is really unable to estimate the importance of the condition and of the prohibition which it implies. She has to balance her legal rights against her testamentary provisions, but these latter are weighted with this condition, the importance of which she is at that time wholly unable to realise. She is, therefore, not in a position duly to compare the two. She most probably over-estimates the testamentary provisions because she under-estimates the condition which accompanies them. No amount of consideration could remove this inability to see things in the light in which she would come to see them. Nothing but time and the abatement of feeling can do that. It was lawful for her to marry again. There was nothing wrong about it. Mr Keiller's feeling or sentiment, if he entertained it, may be natural enough, and even to his credit, but the law does not regard it.

"I think that a widow should not be held to her election unless she makes it either of her own unaided volition, or in such circumstances and at such time as may relieve her mind from bias, prejudice, and emotion, so far as the necessities of business and the interests of others permit. If an estate requires to be immediately wound up and distributed, then perhaps she must elect and do the best she can, but if there is no reason for pressing on her election, I think that three months after death is too short a time, and that at that time she might probably feel such a distaste for the idea of a second marriage as would make the conditional forfeiture appear a very light condition. To ask her to elect is like asking her to make up her mind whether she shall remarry, which seems an unfair question if it can be postponed. On the whole I incline to think that it would have been better had Mr Stephen advised her to postpone her election.

"In my opinion the pursuer is entitled to succeed on this ground alone, although I am not aware of any authority which goes quite so far.

"But this is not the only ground, for in the first place she had no separate independent legal adviser—always an important point, however honourable and reliable the legal advice which she enjoyed may have been; and, secondly, I think that the statement of her husband's succession was hardly sufficient, having in view that the chief asset was of a very peculiar character, and that the questions as to the value of it are very complicated.

"No. 7 of process is the state of the succession which was laid before Mrs Bruce, and there are only one or two points about it which it is necessary to notice. The whole nett estate was estimated as amounting to £18,830, 1s. 11d. The chief item is 'James Keiller & Son, Limited, £15,612, 10s.'; that is to say, that sum is stated as the value of Mr Bruce's shares in that company. There are a number of other items in that part of the account which require little explanation, and no doubt received all they required. It is not said that there were any of them which Mrs Bruce did not understand. The result is brought out thus:—

'One-third of the above sum.	£6110	0	8
£10 a-year as terce, value say	148	0	0
Aliment, ...	300	0	0
Mournings, . . .	80	0	0
Add—			
Life policies (taken in name of Mrs Bruce), .	2110	6	0
	£8748	6	8

'£8748 at 3½ per cent. would yield £306.'

"That purports to show the capital she would get and the income she would secure if she took her legal rights. Of course £306 is a good deal more than the interest which could be derived from her *jus relictæ*, for the value of the policies is included. The interest from the *jus relictæ* would be only about £242. The information in this part of the state is defective in these two respects. It gives neither the number of the shares in Keiller & Son nor their value, and it says nothing about the board of the children. That is the one side set out with a view to election. The other side is this:—

'(1.) Net annual income of estate, £2000, subject to maintenance and education of children.

'*Note.*—Income ceases in the event of Mrs Bruce marrying again.

'(2.) Household furniture at .	£1461	9	6
'(3.) Mournings, ...	80	0	0
	£1541	9	6
'Mrs Bruce would also be entitled to the fore-mentioned two policies, .	2110	6	0
	£3651	15	6

"'The above-estimated annual income of £2000 is expected to come almost entirely from James Keiller & Son, Limited, and is therefore subject to the fluctuation of trade.'

"This part of the state purports to set forth Mrs Bruce's capital and her income under her husband's deed, but it affords no means of testing the statement of the income, and it does not explain that the children might in their time elect their legitim and thus possibly reduce her income by one-third. Upon the state of the succession as thus set before her, Mrs Bruce's choice seemed to be between a capital of £8748, 6s. 8d., yielding an income of £306 on the one hand, and a capital of £2110, with furniture, &c., *plus* an income of £2000.

"Of course, on comparing these two sides of this state, one is at once struck by the startling fact that the income which could be got from the *jus relictæ* is only about one-seventh of the total income, when it might be expected to be one-third. When this apparent paradox is examined into, it is seen to arise from this, that the shares of Keiller & Son are valued at £12, 10s., but that they yielded about thirteen per cent. on that valuation.

"When, again, it is asked how it comes about that a share which yields thirteen per cent. for £12, 10s. should only be valued at that amount, and not at three or four times the amount, there are two answers given. The first of these is founded on two articles of association of Keiller & Son, Limited, the 33rd and the 113th. The 113th article provides that the directors shall, annually at the times mentioned, value the stock, and that all questions as to the value of shares and stock shall be regulated by that valuation, until a re-valuation. The 33rd article provides that the board 'may decline to recognise or register any transfer of ordinary shares, or ordinary stock made to any person who, in the opinion of the directors, should not be admitted as a member of the company, or who being a member of the company, should not in the opinion of the directors be allowed to acquire or possess more ordinary shares or stock, but they shall only be entitled to exercise this power of declinature on the condition that they name a person or persons willing to purchase the shares or stock at the price at which they were valued under article 113.' Now, it is proved that at the date of Mr Bruce's death the valuation of the ordinary shares (Mr Bruce's were ordinary shares), as valued under article 113, stood at £12, 10s., whence it was argued that that was the only price which could be got for these shares, because the directors were entitled to intervene and purchase at that price any shares offered for sale.

"The second answer was that £12, 10s. was the true value of the shares. The shares are not quoted, and have nothing which can be called a market price, but it was said that £12, 10s. would be their value if they were offered in the market. Now, on this point there was a great deal of evidence, and several accountants of the highest standing, skill, and experience, were examined on either side. The witnesses for the pursuer deponed that the true value of the shares was very much greater than £12, 10s. They founded on the long endurance and stability of the firm, and were of opinion that the shares of a commercial company which stood so high in public favour would readily sell on what they called a five per cent. basis; and further, on the fact that, besides dividing their large dividends, they had been able to devote a great part of their revenue to payment of debt. The witnesses for the defenders, on the other hand, held that it was necessary to take into consideration the speculative nature of the commodities in which Keiller & Son dealt, the debt, the large amount of the goodwill stated as an asset, the want of any proper reserve, and the relation of the preference to the ordinary shares.

"Now, about these points I do not think it necessary to say more than this, that at least the second of them involves questions of extreme difficulty. The skilled witnesses differed widely, and it is out of the question to suppose that Mrs Bruce could understand it, or indeed the point which depends on the 33rd and 113th articles of association either (about which I desire to reserve my opinion). She had necessarily to form her idea of the value of these shares from the advice she received. Now, it is to be remembered that the proof led is not a proof of the value of the estate; that was excluded from the proof. It would not be competent for me to decide it now. The proof does not show that Mr Stephen's estimate of the value of the shares was wrong. Far from that. That was not its aim. That was not remitted to probation. But I think it shows that the matter was debateable, and that the difference between two highly respectable opinions involved a large amount. It was maintained by the defenders that it appeared from the proof that the state of succession on which Mrs Bruce proceeded was perfectly correct, and that she made no mistake at all. But, as I have said, I do not think I can consider that, but only whether the information she possessed was so full, intelligible, and exact that she is foreclosed from drawing back from her election although nothing has followed on it. The question is not easy, but I am disposed to answer that she is not foreclosed. To warrant recal of an election it is not always necessary to prove mistake as to the value of the estate. There was no such mistake proved in *Inglis* v. *Inglis*.

"Further, I have noticed that there were

some things which it was important for Mrs Bruce to have in view which are not written down in the state of succession; there is, on the one hand, the sum which she would get as board for her children, and, on the other hand, the possible diminution of her testamentary liferent by the demand of the children for their legitim.

"I do not doubt that these matters were explained to Mrs Bruce verbally by Mr Stephen. But the fact remains that her attention must have been drawn mainly and emphatically to what was written and was laid before her as exhibiting what it was important for her to consider, and it would appear from her evidence that she did not fully appreciate what was said on these other points when she had not the written state to guide her. On the whole, I do not think it proved that Mrs Bruce, when she made her election, had sufficient knowledge of the extent of her legal rights to enable her to make an intelligent and deliberate choice. Perhaps, considering the very complicated character of the assets, it may be doubtful whether her election would conclusively bind her, unless she were advised by a lawyer who had, as representing her, a definite antagonistic interest to the trust-estate and to the directors of Keiller & Son.

"Several authorities were quoted on both sides, but I do not think that any of them, other than those which have been mentioned, afford much assistance, except *Donaldson* v. *Tainsh's Trustees*, June 11, 1886, 13 R. 967, to which, and especially to the opinion of Lord Justice-Clerk Moncreiff, I desire to refer. In that case the widow seems to have had much more to complain of than the pursuer here. The case differs in many respects from this case, but it has many features in common, and it appears to me that the opinion of the Lord Justice-Clerk is in the main applicable to this case. In that case the widow was restored against her deed without a reduction of it, but here the pursuer has brought a reduction of the deed of election, and it appears to me, for the reasons which I have endeavoured to explain, that she is entitled to succeed, on the ground that it was executed by her under circumstances in which she was unable duly to appreciate or estimate the conditions, attaching to her testamentary provisions, and because it was executed without independent legal advice, and without adequate information in regard to her legal rights."

The defenders reclaimed, and argued—(1) There was no evidence that the pursuer had been unduly hurried into making her election. She made her election three months after her husband's death, and even if the election had been made at a much earlier date after the death, there was no presumption that the widow was *in luctu*, viz.—so overwhelmed with grief as to be unable to decide—*Macgrigor* v. *Black*, March 2, 1839, F.C. The pursuer did not complain at the time she made her selection of undue hurry. She had been told frequently that she could take as long as she pleased to make up her mind. Of course she was aware that the trustees wished matters settled as soon as possible. It was the duty of trustees to see that an election was made between legal and conventional provisions as soon as possible. It was a proper piece of trust administration to settle such a matter at an early date. If election to take legal rights was made, the estate had to be valued at the date of death, so it was the only prudent course to have an election made, and rights definitely ascertained as soon after the death as possible. A widow's right to terce and *jus relictæ* was a claim against the estate of the deceased, and it was the duty of the trustees to get the claims against the estate settled as early as convenient—*Ross* v. *Masson*, February 3, 1843, 5 D., opinion of Lord J.C. Hope 488; *M'Murray* v. *M'Murray's Trs.*, July 17, 1852, 14 D. 1048; *Keith's Trs.* v. *Keith*, July 17, 1857, 19 D. 1040; *Earl of Dalhousie* v. *Crokat*, March 26, 1868, 6 Macph. 659. (2) It was said that the pursuer had no independent legal advice. But that was not the fault of the defenders. Mr Stephen had asked her again and again to take separate advice, but she always refused to do so. (3) It was contended that the estate submitted by Mr Stephen to the pursuer did not contain full information. But this state had been supplemented by conversations between the pursuer and Mr Stephen, in which the latter had fully explained that the estate would be diminished if the children claimed legitim when they came of age, and that the pursuer had right to an allowance for maintenance of the children in the event of her electing to take her legal rights. Then as to the valuation of the shares — The valuation was a fair and honest representation of the value of the shares at the date of the husband's death. The valuation must be taken as at that date—*Gilchrist* v. *Gilchrist's Trustees*, July 19, 1889, 16 R. 1118. It was outwith the question to argue that they had risen since, or to point to the fact that they were now more valuable. If the widow had chosen her legal rights the trustees could not have given her the shares. A widow who elected to take her legal rights was not entitled to a share of the estate. Her right was that of a debtor, and she was entitled to be paid in cash a proportion of the value of the estate—*Fisher* v. *Dixon*, June 16, 1840, 2 D., opinion of Lord Fullarton, 1140; *Earl of Dalhousie, supra*, 6 Macph., opinion of Lord Curriehill 666; *Inglis* v. *Inglis*, January 28, 1869, 7 Macph., opinion of L.-P. Inglis, 437. In 1895 £12, 10s. was a fair and reasonable price for the shares of an industrial company like James Keiller & Son, Limited, which had no reserve and was owing large sums to J. M. Keiller. £12, 10s. had been accepted as a fair price by the Inland Revenue, and it was an ordinary step in trust-administration to take the valuation in the inventory as the value of the property in questions of *jus relictæ* and legitim—*Breadalbane's Trustees* v. *Duchess of Buckingham*, May 26, 1842, 4 D., opinion of Lord J.-C. Hope, 1264. Besides, the auditors of the company had valued the stock at this price under

article 113 of the articles of association, and under article 33 the directors could refuse to register any transfer of the shares on their finding a person willing to purchase them at the above price. This article was quite legal, and in the absence of any evidence to the contrary the Court would assume that the directors were acting reasonably and *bona fide* in refusing to register a transferee—*in re Gresham Life Assurance Society* 1872, L.R., 8 Ch. Ap. 446; *in re Coalport China Co.* [1895], 2 Ch. 404. In short the directors had the absolute discretion of admitting a transferee or paying him out at the above price. In all these circumstances £12, 10s. was a fair valuation for these shares. Even if they were worth more they would only have been discovered to be so after a protracted litigation, and a widow was not entitled to go back on her election merely because she had not been told that if the trustees engaged and were successful in a lawsuit the results of which were very doubtful, the value of one of the assets of the estate might possibly be raised. All the evidence in the case went to show that the election had been deliberately made without undue pressure, with full information, and after plenty of time for consideration.

Argued for pursuer—The judgment of the Lord Ordinary was right. (1) The pursuer had been unduly pressed to make her choice, and too little time had been given to her. It was plain that both Mr Keiller and Mr Stephen disapproved of her hesitation and showed themselves very anxious that the pursuer should make up her mind at once to take the provision in the trust-deed. There was no need for this undue haste. It would not have prejudiced anyone if the estate had been kept intact and the election not made for years, as Mr Bruce died in 1895, and the elder child would not attain majority till 1901. Taking her conventional provisions in the present case resulted in her being barred from marrying again without losing everything, and within three months was too soon after her husband's death for a widow to give due consideration to the question whether she would or would not marry again. It was the duty of trustees to see that a widow, before she made up her mind to an election injurious to her interests, was acting not from emotional feelings as to what she might suppose to have been her husband's wishes — *Donaldson* v. *Tainsh's Trustees*, June 11, 1886, 13 R., opinion of Lord J.-C. Moncreiff, 972. That led to the next point—(2) The pursuer had no separate advice. She was plainly dominated by what she considered to be the wishes of Mr Keiller and Mr Stephen. Mr Stephen should not have been satisfied with her refusal to employ a separate agent, but should have insisted on her doing so. It was a typical case for independent legal advice. (3) The state submitted to the pursuer did not contain a sufficient explanation of the position of matters. In the document there was no statement that if she chose her legal rights she would also get an allowance for the maintenance of the children, or that in the event of her accepting her conventional provisions these might be diminished if the children demanded their legitim on attaining majority. It was vain to aver that these matters had been mentioned in conversation by Mr Stephen. Verbal statements were worth nothing, the widow could not be held to have taken them into consideration. The shares were clearly of a much higher value than £12, 10s. It was contended that article 113 restricted their value, but directors could not object to a transfer without good reason, and this article should not therefore affect the marketable value of the shares—Lindley on Companies, 5th ed., 465. £10 shares yielding 17 per cent. were very much undervalued at £12, 10s.

At advising—

LORD YOUNG—The pursuer is the widow of William Keiller Bruce, confectioner in Dundee, and the defenders are his testamentary trustees and executors. The action concludes for reduction of a deed executed by the pursuer, whereby she declared to the defenders that she accepted the provisions to her in her husband's will, and departed from her legal rights on his estate. I think it desirable to read those words of the deed which alone, I think, are of any importance. It has a long—I think superfluous narrative, but the only important words are these—"Therefore I do hereby formally declare to my said husband's trustees, namely," herself, "the said Mrs Hannah Barbara Storrier or Bruce, John Mitchell Keiller, and William Walker Stephen, my election to accept of and abide by the provisions of said trust-disposition and settlement, and I do hereby acquiesce in, homologate, and confirm said trust-disposition and settlement and codicil in their whole heads, articles, and clauses; and I further declare"—that is, she declares to herself and her two co-trustees—"that I for ever depart from all right competent to me before the granting hereof to resort to the rights conferred upon me by law in my said husband's estate; and I consent to registration hereof for preservation."

It is a remarkable deed. It was registered within a day, or two days, in the Books of Council and Session for preservation. But I think the case before us is exactly the same as if the widow had addressed a letter or any other paper containing these words and given it to Mr Stephen, her co-trustee and the agent for the trust, or otherwise declaring that she elected to abide by the deed, to take the provisions under it, and binding herself to renounce all her legal rights.

Mr Bruce, the testator, died on 19th March 1895, survived by the pursuer, his widow, and two children, a son and a daughter. We are told that the son is now eighteen years of age and the daughter fifteen. He left a will with provisions disposing of his whole property in favour of his wife and children and of none others. The import of these provisions may comprehensively, but I think suffi-

ciently for the question before us, be stated to be that the trustees are directed to hold his property and pay the income thereof to his widow while she survived and remained unmarried, with an obligation on her to maintain, educate, and bring up the children, and on her death or marriage the trustees are directed to pay the whole capital to his children. The provision to the widow is declared to be in lieu of terce and *jus relictæ*, and there is a declaration that it shall cease and become void in the event of her marrying again. The provision to the children is declared to be in lieu of legitim. There are minor details in the will which I omit to notice at present as being in my view immaterial to the question I am about to deal with. They certainly do not interfere with the fact which it is my immediate purpose to point out, namely, that the pursuer, the widow of the deceased, and her two children, are the only persons who are or ever were interested in the estate of this testator, which is now in the hands of the defenders as his testamentary trustees and executors. Whether they shall respectively take the provisions of the will or their legal rights of terce and *jus relictæ* on the part of the widow and legitim on the part of the children or of either of them is their own affair. The whole estate of the testator must go to them to the exclusion of all others.

It is admitted that the pursuer was under no obligation to execute the deed sought to be reduced, and that therefore it was gratuitous and absolutely without consideration of any kind. It is not suggested that had she declined to execute it the defenders would have been bound or entitled to withhold from her the income of the estate for the support of herself and the maintenance and education of her children so long as she continued to decline. They might no doubt have declined, unless on condition of receiving from her an abandonment of her terce and *jus relictæ*, to make any payment to her which might be prejudicial to the interests of the children in the event of her subsequently claiming her legal rights, but there was certainly no other interest involved, and if that interest did not require, at the date of this deed, a formal and binding abandonment of these rights—as admittedly, and certainly clearly, it did not—there was no other that did. The children could not and cannot be required to renounce their right to legitim—the son till he attains majority, and the daughter till she attains majority or is married—and not even then unless some legitimate interest shall then require such renunciation. There can be no other such interest than the widow's, exactly as there can be no other interest than that of the children requiring similar renunciation by the widow.

The interests of the children being safe, and the defenders as executors exposed to no risk of incurring any liability, though the whole income of the estate was paid to the widow for several years—say, till the son became major—for herself and children together, how is their conduct in demanding from the widow the deed in question at the very commencement of her widowhood to be justified or even explained consistently with ordinary good sense and right feeling. Irrespective of the questions regarding the value of the estate and the comparison of the money consequences of electing for the will or for legal rights, I think it was not merely inconsiderate but unfair and unjust to demand from this very recent widow a formal obligation which implied and indeed expressed an obligation under a serious penalty never to marry again, and that quite ultroneously, that is to say, not for the defence or protection of any legitimate interest with which the parties making the demand were charged. As trustees and executors of this testator, and charged with no other legal interests than those of his widow and children, they would not, I think, have demanded, or even without serious remonstrance have accepted, this deed from Mrs Bruce. What other feelings or impulses foreign to their duties as Mr Bruce's trustees and executors may have been upon them I cannot say, and so I must content myself with what I have said—namely, that what they did was not required by their duty either to Mrs Bruce or to her children, with whose interests alone they were legitimately charged in the matter in question.

Now, we are dealing here only with the reductive conclusion. The wife wishes to be restored against the obligation which she came under by that deed; and admittedly she can be restored without prejudice to any legitimate interest with which these trustees are charged. Now, my opinion is, concurring with the Lord Ordinary in this, that before gratuitously giving an obligation at a time when it was not required by any legitimate interest of others, she ought to have had time to consider, and I think she ought to have had an independent adviser. I am speaking now irrespective of the value of the estate and the question of which we heard so much as to the capital of the shares of Keiller & Company in which the estate to a large extent consisted. Irrespective of that altogether, I think before coming under a binding obligation to accept the provisions of the deed and to renounce her legal rights, she ought to have had an independent legal adviser. And I cannot doubt that any independent adviser would have told her—"You ought not to make your election now or come under any obligation in the matter now. It is not reasonable to require that you should. There is no interest in your children that you should come under any obligation. It is reasonable and proper that you should let it stand over—even for years. For it may stand over for years without injury or risk to anybody." I cannot doubt, looking to the facts, and also looking to her evidence, that if she had got that advice she would have acted upon it. I

understand Mr Stephen to say that he gave her no advice on the subject. But if he took the position, if he consented to take the position of her adviser and guardian in this matter, I think he was in duty bound to give her advice. This action was not brought till four years after her husband's death, and the Lord Ordinary says she probably was induced to bring it because she had become engaged to be married again. That is probably true. But I think the question before us must be decided precisely as it would have been had she, a day or week or month after she gave this obligation to Mr Stephen, come forward and said—"That election was taken from me quite prematurely, and I agreed to give it and gave it hastily and inconsiderately; I wish to recal it (which I can do without prejudice to anybody) that I may consider the matter further and have advice upon it." If she had done that, would it have been legitimate on the part of the trustees to say—"No, we have got a document with these words" which I have read, "written upon it and signed by you, and we will hold you to it. You are not entitled to have it back?" I think the Court would not have hesitated to let her be restored against the obligation in these circumstances. Now, it does not signify (if the interests of the children are in no way prejudiced) that she delays making the complaint that she did not receive proper advice or come to a reasonable resolution on the subject for two or three years, nor does it signify whether she married in the course of the litigation or not, or that she was prompted to it by having fallen in love with a gentleman who proposed to her, and come to the conclusion that to marry him would be most conducive to her happiness. The case has to be decided on the consideration whether or not the obligation was properly taken from her without any undue haste and after reasonable opportunity for consideration and advice on her part. I think it was not taken after such opportunity, and I think she ought not (as she was by being put under an obligation to take the provisions of the deed) to have been put under an obligation not to marry again except under the penalty of forfeiting the provisions of her first husband's estate.

I do not desire to express any opinion upon the rights of Keiller & Company (who are not parties here as Keiller & Company) or of J. M. Keiller as a partner of Keiller & Company. But it may account for the very extraordinary proceedings of these trustees, that one of them is himself almost Keiller & Company, for he holds almost the whole of its shares, and that the other was very much devoted to him and has been made a shareholder by him, as he explains in his evidence, by getting preference shares now in order to save duty, which J. M. Keiller meant to leave him as a legacy. We can decide nothing, either against or in favour of Keiller & Company. The value of the deceased Mr Bruce's estate may be greatly affected by the right of Keiller & Company, if such right exists, to decline to recognise any realisation of that estate so far as consisting of the shares of Keiller & Company, except upon the footing of handing over all these shares at £12, 10s. a-piece. I think there is room for serious argument and consideration of whether they have any such right; but we cannot decide that question, and I rather think it would be unbecoming to express any opinion upon it except in a question between Keiller & Company interested to maintain one side of that question, and another party interested to maintain the other side. The trustees here have maintained Keiller & Company's side of that question in this case, although that is manifestly against all the interests with which they are charged. But for this deed which is under reduction the widow was entitled to take her *jus relictæ*, and the children were certainly entitled to take their legitim. Is it for the trustees representing their interests and holding these shares to maintain that they are only worth £12, 10s. each, and must be delivered up at that although yielding an income of £2000 a year? Keiller & Company may possibly maintain that. But it would be the duty of the trustees not only not to maintain it for them, but to resist it, in the interests with which they are charged. Therefore the position they have taken here of maintaining Keiller & Co.'s right, and leading a great deal of evidence in support of it against the interests of those whom they represent, strikes me as a marvellous position for them to take up, and when I called attention to that in the course of the discussion I received no intelligible explanation of how they came to do that. I am going to give no opinion on the provision of the articles of partnership about valuing the shares annually or periodically. It may be changed any day. Was Mrs Bruce informed of that? And the value of the shares may be changed any year. It may occur—I should think it rational if it did—to those entrusted with the valuation that £12, 10s. was, as it occurred to Mr Stephen, a ridiculous valuation for shares which were yielding the return which they did and do; it may rationally occur to those who value in future years that that is not a fair sum to put the shares down at as their full value, and that may be changed; or even the very article in which that is required to be done may be changed at any time. Then again there is a provision enabling the directors, acting for those who are partners of the company for the time—they may be two or three or possibly only one—to insist that any shares of a deceased shareholder shall be handed over to the survivors or survivor at £12, 10s., or any other sum that is named. That may be changed any day also. Now, how was Mrs Bruce to judge of these matters? She would have required, in order to form a judgment, at least in the opinion of these trustees, to have had all evidence on the subject which they have led to instruct us.

How could she form an intelligent opinion upon her testamentary as compared with her legal rights without that knowledge. I therefore agree with the Lord Ordinary here also in thinking that she was not in a position to form an intelligent opinion upon this subject, and this only strengthens the observation that this obligation was taken from her prematurely, hastily, and without anything approaching to due consideration.

Then the position of the children was a serious matter for her consideration—for if the children when they attain majority elect to take their legitim, as they are entitled to do, that will instantly reduce the estate payable to her under the will by one-third. I do not think that it is proved that she was informed that if the children took their legitim, one-third of the income derived from the liferent her husband gave to her would be taken off, or that if one of them took that legitim, and the other did not, one-sixth of the income would be taken off. I do not think these things were considered by the trustees.

I am of opinion that the pursuer is entitled to restoration against this obligation at once. After that questions may arise which it may be found impossible to decide or even deal with, but the parties will consider that. On the record the pursuer states that she elects to take her terce and *jus relictæ*. I think the case would have been just the same if she had not made any election and said—"I want to be restored against the obligation, and to have opportunity to make the election according to the circumstances when I am better acquainted with the state of matters and also with my own feelings." But she says in this record that she elects, and that is before she was married, for she was not married for some months after the action was raised. After her marriage she must of course elect to take her legal rights, because her marriage would destroy any rights under the will except in so far as she had received them. That exception is one of the provisions of the deed which I said that I did not refer to as being unimportant with regard to the general question with which I have been dealing. The words are — "Declaring also that the provision of the said annual proceeds hereinbefore conceived in favour of my wife shall cease and determine and become null and void in the event of her marrying again after his death; saving to her only whatever she may have received from my said trustees during her viduity"—that is to say, the payment to her shall cease when she marries again. Well, she might have asked to be restored against the obligation, and the Court would have been bound to consider that request before she had come to any resolution to marry again or come to any election as to whether she would take her legal rights or not. I think she is entitled to have the case decided on that footing now.

I do not see how the widow's rights in the question with Keiller & Company can be decided in this accounting. She asks an accounting against the trustees here —there is a conclusion for that—and payment of her *jus relictæ* now; there is a conclusion for that, but I think the parties had better consider this, whether they will demand that the trustees should realise these shares until it has been ascertained whether Keiller & Company are entitled to have them realised, and at the price of £12, 10s. Whether Keiller & Company can insist on the trustees realising at £12, 10s. in order to pay the widow is a question which cannot be determined in this accounting or in any accounting with the trustees. So far as I can see, there is no room for that in accounting with the trustees, who hold for behoof of whoever are entitled to them under the will or at common law through the death of Mr Bruce. Until it is determined whether Keiller & Company are entitled under those provisions of the deed of partnership or otherwise to demand that they shall have these shares at the price of £12, 10s. each, it will be impossible, I think, to ascertain what the *jus relictæ* is. But that is for the consideration of the parties themselves.

In the meantime I state it as my opinion, with reference to the only conclusion which the Lord Ordinary has dealt with, that his judgment is right; that the pursuer is entitled to be restored by reduction, which is just restoration—it is the most proper meaning of the word reduction; that she is entitled to be restored by a process of reduction against the premature and hasty declaration which was taken from her within three months of her husband's death.

LORD TRAYNER — I cannot say that I regard this case as one altogether free from difficulty, but I agree in the conclusion at which the Lord Ordinary has arrived. It is unnecessary to repeat the details which the Lord Ordinary has given as to the circumstance under which the alleged election was made by the pursuer, and I shall do little more than indicate the grounds of my decision. It is of course quite clear that in order to make an election binding the person making the election must have before him everything that is material and calculated to affect his choice. I think this essential condition was wanting here. The most valuable part of Mr Bruce's succession consisted of the shares held by him in the company of James Keiller & Son, Limited. In the state of the succession of her deceased husband exhibited to the pursuer by the defenders these shares are entered as a sum of money amounting to over £15,600. I do not think it material that the number of such shares was not given or that the value of them was not entered at so much per share. For that information was given to the pursuer, who knew well enough that the £15,600 was not a debt due by Keiller & Son to her husband, or anything else than the estimated value of the shares held by him in that concern. In reaching

that sum, however, the shares were treated as of the value of £12, 10s. each. Now, I am not prepared to decide in this case whether the pursuer was bound, regard being had to the company's articles of association, to accept that valuation of the shares, or whether she was entitled to insist upon a different valuation. But I do think it was an important consideration for her to have before her that she was at least entitled to raise the question. Of this she was certainly not informed by anyone, and, yet if such a question could be raised and successfully maintained, there is, on the evidence before us, some ground for the view that this item of the deceased's succession would have been at all events doubled. I believe with the Lord Ordinary that the agent for the defenders did not intentionally conceal anything from the pursuer, and that he was convinced that the shares could not produce more than the sum they were valued at in the state. But he should have made it clear to the pursuer that she might take a different view, and one very much to her advantage, if the view turned out to be a sound one. It was also very important as tending to influence the pursuer's election that the question whether, if she elected to take her legal rights, she could insist on delivery of one-third of the shares *in forma specifica*, or could only take a third of their price as valued by the defenders, was a question she was entitled to raise. But this was not put before her. It is the manner in which this matter of the shares was dealt with by the defenders that weighs most with me in coming to the conclusion that the alleged election by the pursuer cannot be sustained.

It is also of importance to bear in mind that the pursuer was more or less urged to make her election without having the advantage of independent advice. I agree with the view expressed by the Lord Justice-Clerk in the case of *Donaldson*, in reference to the duty of trustees in a case of this kind, seeing and insisting on the widow having independent advice "before she makes up her mind to an election, which will be injurious to her pecuniary interests." I cannot doubt that if the pursuer here had had the benefit of such advice from any intelligent law-agent, that the questions I have already adverted to would have been placed before the pursuer, and duly considered before any election was made. But these questions were not even suggested for consideration by the defenders' agent, because he had already determined in his own mind that no such questions could be raised. The possibility of the children, on attaining majority, claiming their legitim, and thus necessarily reducing the conventional provisions in favour of the pursuer, was a matter also requiring to be explained to the pursuer as affecting her election. But this matter was not put before her.

There is another matter connected with the children which is not immaterial. From the information given to the pursuer she learned that if she accepted the provision made for her by her husband she would have an annual income of about £2000 burdened with the education and maintenance of her children. If she took her legal rights she would have only about £300 a-year. Upon this latter income the pursuer could not have maintained and educated her children as well as maintain herself. It was not explained to the pursuer—at all events she did not understand—that if she took her legal rights she would be entitled to an allowance for the upbringing of her children. The prospect she had to face was £2000 a-year with her children or £300 a-year without her children. I know that Mr Stephen says he explained to the pursuer that if she took her legal rights the trustees (defenders) would make her an allowance—he hoped a liberal allowance—for the children so long as they remained with her. The pursuer, on the other hand, says—"I was never told that if I claimed my legal rights I would get an allowance for my children so long as they lived with me;" and she adds that she did not see how she could live on £300 a-year, and support the children. These different statements cannot be reconciled by any explanation I have heard or can think of, yet they are made by persons both of whom are regarded by the Lord Ordinary as honest and reliable witnesses. I see no reason to doubt the correctness of the Lord Ordinary's estimate of their character. But when two perfectly honest witnesses make statements so entirely different as those to which I have referred, it is plain at least, that in the interviews at which the thing spoken of is said to have occurred, the two persons had not understood, but seriously misunderstood, each other. I therefore conclude that it was not made clear to the pursuer that in taking her legal rights she did not need to give up the society of her children, for whose benefit the defenders would make the pursuer an allowance, without which she could not have kept them. Any doubt upon this subject must necessarily have influenced the pursuer's choice. Here again the pursuer was called on to make her election without being fully informed or made aware of its effect.

I am not disposed to say that the pursuer was unduly pressed to make her election by Mr Stephen. I think he wanted to act by her with perfect fairness. But he undoubtedly conveyed to the pursuer the impression that Mr Keiller (from whose favour the pursuer looked for some advantage for her son) desired it to be done at once. There was no necessity for any despatch, but Mr Keiller wanted it done. I think the pursuer might have been left alone with the matter upon which she had to determine for a much longer period than the three months following upon her husband's death. While I think there was no pressure brought to bear upon the pursuer which she or any woman of ordinary firmness could not have resisted, yet I think she was hurried into election in a way not to be entirely approved.

On the whole matter, I am of opinion that

the judgment reclaimed against is right, and should be affirmed. I come the more readily to that conclusion that it can do injustice to no one, and may save the pursuer from an injustice to which she should not be subjected.

LORD MONCREIFF—I am also of opinion that the Lord Ordinary's interlocutor should be adhered to. The defenders to this action of reduction are the trustees of the first husband of the female pursuer. The defender Mr John M. Keiller is director and largest shareholder in the firm of James Keiller & Son, Limited. The defenders oppose reduction of the deed of election in the interests of the female pursuer's children by her first husband, their interest being that if the deed of election is reduced their mother will take her legal rights out of the trust-estate, whereas if it stands she will get nothing, having forfeited the provisions in her favour by marrying again.

It may be that the pursuer having signed a formal deed of election and acted on it for some years, the defenders were entitled to take the judgment of the Court before allowing her to betake herself to her legal rights; but having discharged the ungrateful duty of opposing her desire to revoke the election, I think they might well have rested satisfied with the Lord Ordinary's judgment on that point, which would have amply exonerated them.

However, they thought fit to reclaim against that interlocutor, and before us they keenly contested the pursuer's right to revoke. It is plain that if the pursuer is allowed to revoke her election, there lies behind an accounting which may raise questions of considerable difficulty with the directors of James Keiller & Son, Limited, affecting the value of the shares held by the trust in that concern, and also the right of the pursuer and her husband to be accepted as shareholders if some of the shares are transferred to them. A desire to avoid trying such questions with the pursuer, if it exists, must be disregarded altogether. As trustees the defenders are bound to obtain the highest value for the shares which they hold, and if necessary either themselves to try the question with James Keiller & Son, Limited, or to lend the pursuer their names in order to enable her to try it.

The question raised by this reclaiming-note is by no means free from difficulty, because in the absence of fraud or misrepresentation the Court is always slow to allow a grown man or woman to go back upon a formal agreement which he or she has signed with apparent deliberation. Now, it is proved that the pursuer signed the deed of election with a certain amount of deliberation, and after receiving a certain amount of information to enable her to choose between her conventional provisions and her legal rights. There is no suggestion of fraud on the part of Mr Stephen, and the defenders could not well have desired a more candid statement of the pursuer's knowledge of what she was doing than her own evidence, which in her manifest desire to be perfectly fair to Mr Stephen puts her case at its very lowest.

But on considering the whole circumstances I agree with your Lordships that the pursuer is entitled to have this deed set aside.

First. She was undoubtedly unduly pressed to make her election, which involved a decision upon a very delicate matter, when there was not the slightest occasion for hurry. From time to time she was pressed for a decision, now being allowed a fortnight, now a few days, to make up her mind, and ultimately the deed was taken from her within three months of her husband's death. This deed involved a decision as to whether she would or would not marry again—that is to say, whether she would renounce the prospect of marrying again except at the expense of forfeiting all her rights in her husband's estate. I agree with the Lord Ordinary that that is a matter as to which a widow should be allowed the fullest time consistent with the interests of the trust. She cannot be expected to weigh the conflicting considerations dispassionately in the early days of her widowhood. In the present case I think the pursuer was not allowed sufficient time. Mr J. M. Keiller pressed her for a decision with an urgency which was unreasonable, and which has not, to my mind, been satisfactorily explained.

It might have been otherwise if any of the trust purposes had required an immediate decision. But that was not so. No harm would have been done if her decision had been delayed till now.

Secondly. Looking to the probability of a serious question with J. Keiller & Son, Limited, as to the value of the shares held by the trust, and the fact that the defender Mr J. M. Keiller had or might have an adverse interest, I think that the defenders should have insisted on the pursuer having independent legal advice.

Third. The statement which was laid before the pursuer professedly for the purpose of enabling her to decide as to her election was, in my opinion, inadequate. In particular, the number and value of the shares held by the deceased in James Keiller & Son, Limited, are not stated. The only reason given why full information on this point was not inserted in the state is that the directors of the company were extremely desirous that the affairs of their concern should not be made public. That may have been desirable from the company's point of view, but it was not a legitimate reason for failing to furnish the pursuer, in writing which she could show to any friend whom she wished to consult, with the fullest information as to the value of the estate. It is no answer to say that everything was explained to the pursuer verbally. We heard enough during the debate on the question of the value of the shares and the scope of the articles of association to enable us to see that questions of considerable intricacy and difficulty, which a lady could not be expected to carry in her head, even if she understood them, may arise in the accounting. It is sufficient that the state

furnished to the pursuer does not contain the slightest indication of the existence of such questions or afford materials for forming an opinion upon them. There were other considerations which should have been but were not put before the pursuer, but as these have already been noted by your Lordships I need not repeat them. I therefore agree that the interlocutor reclaimed against should be adhered to and the case remitted to the Lord Ordinary. I agree with Lord Young that the deed of election having been reduced, the parties will have to consider very carefully what the next step is to be, because I do not think the accounting can proceed until the question with J. M. Keiller & Son has been determined in some way or other. However, that is a matter for consideration.

Lord Justice-Clerk—I entirely concur in the views your Lordships have expressed, and your Lordships have stated the case so fully that I do not think it would be discreet that I should state my own views at any great length. I may just state my views generally on some points which specially struck me in the debate and in reading the proof. I agree with your Lordships in thinking that in this case the widow did not get time or proper care in the way of information to enable her to make up her mind. I think it is essential in such cases that the widow should be fully, fairly, and ripely advised as to all the facts which are pertinent to the matter in order that she may make up her mind calmly and quietly. Certainly calm and deliberate consideration is necessary with full information and with neutral and skilled advice. Time in such a matter I think is of the greatest consequence, because you are not dealing with a person engaged in an ordinary matter of business. You are necessarily dealing with a person of whom it is to be assumed that her regret and her grief for her husband's decease, and her desire, it may be, not to go against what he may have wished for her, may have a very serious and biassing influence on her mind, and prevent her giving that calm consideration which she is entitled to have the opportunity of giving to such a matter. As your Lordships have pointed out, there was no need here for any hurry. No human being could be prejudiced by the matter being delayed for any reasonable time, and there were many reasons against hurry. I wish to say very distinctly—for I think it only fair to say it after what your Lordships have said—that I make no imputation whatever on the *bona fides* of Mr Stephen. I think he erred in what he did, as all of us may err, but that he was honestly desirous of doing his duty and doing what he believed to be right in the circumstances I have not the slightest doubt, and I think it only due to him to say so. But then I think that the evidence discloses that this lady was not informed as she should have been. She received no information from him, and to a certain extent she herself was answerable for that, for she had such confidence in him that she did not want the advice of anyone else. But I think the trustees and the solicitor to them should have insisted that she should have advice against those who might have an adverse interest or have a particular desire in the matter. She ought, I think, to have been advised by some-one who had no interest but had a duty to make the fullest inquiry into all the circumstances, and to lay them from end to end before this widow. It is a very unfortunate circumstance in this case I think that there was an interest on the part of Mr Keiller, who doubtless had great influence in this matter, and also on the part of Mr Stephen, that the information which I am sure they were both perfectly willing the widow should have, should not be put into such a form that it should come to the knowledge of other people. The consequence was that from the memorandum which Mr Stephen gave to the pursuer, and which she was to consider alone, and might take the views of her personal friends about if she chose, most important matters were omitted. Mr Stephen when asked "Why did you not put in the number of shares and the amount of the shares?" said, "I did not think it necessary; I told the pursuer all about that." But if it was a thing that the pursuer should have been told, it is a thing that should have been before her afterwards on coming to consider the matter, and not depending on her recollection. And indeed Mr Stephen frankly admits that, for he says at another part of his evidence—"It would undoubtedly have been much better had the statement been fuller." In regard to that matter comes in this most extraordinary incident in the case, that not only were the shares in this company earning a large dividend, but earning so much that a large sum could be paid to a reserve fund. That, of course, was a most essential matter to be considered by anyone having an interest in the company at all, and that was not mentioned at all, as I understand Mr Stephen says he did not think it material that that should be mentioned. It may not have occurred to him, but that it was important and material there can be no question. Thus we have these two points before us—first, that the written information given was not full, and, secondly, that even what was verbally communicated was not enough, was not complete. And accordingly when this lady went, as a lady in circumstances naturally will do, to consult a gentleman in whom she had perfect confidence, and who she knew would give her entirely unbiassed advice—her clergyman—I venture to say all your Lordships will agree that he gave advice that no skilled man who knew all about the circumstances would have given. He gave advice under a misconception of the state of matters, that misunderstanding arising from her being ignorant of or having forgotten something that should have been communicated to her.

There were other circumstances that were referred to by some of your Lord-

ships. One of them is about the effect of the widow taking the one course or taking the other course. It was represented to her at that time in the way of a contrast. She was informed that £1700 a-year less would come to her if she took her legal rights than would be received by her if she chose her conventional provisions. But she was not told that if she took her legal rights she would also be entitled to an allowance for the upbringing of the children. Mr Keiller, who was urging the matter, and Mr Stephen, were both trustees, and that matter should have been brought clearly before her by them. It certainly must have come rather as a shock to this lady in the midst of her grief to be told—"If you do not take what your husband has given you you will get £300 a-year, and if you take it you will get £2000 a-year," which were not the actual facts of the case.

I cannot help referring to what is a matter of great importance in considering as to whether this lady was fairly advised—I do not mean in the sense of honestly—but in the sense of fully and properly. There is no doubt that Mr J. M. Keiller was a very dominant party in the whole of this matter. Mr Keiller's condition of mind is carefully noted in Mr Stephen's memorandum of his visit — "Surprised and displeased that there should have been any hesitancy." I do not say that Mr Stephen told this widow that. He may not have told her that, but I have not a doubt in my own mind that it was conveyed very clearly to the widow that Mr Keiller was very anxious about the matter, and that one cause of her electing as she did was her belief in the tremendous power of Mr Keiller, who was practically master in this valuable company in which she had such large assets, and that she was thus influenced in a way that she ought not to have been influenced. I happened to come across a passage which I think clearly brings that out, for the clergyman whom she consulted says in regard to the result of the interview—"Yes, she seemed to be in an intimidated state, not just knowing how Mr Keiller might act." Now, considering that here there could be no prejudice to others whatever through delay, and looking to the whole circumstances of the case, I come to the conclusion at which your Lordships have arrived.

There is only one other matter I would like to mention, and that is, that I entirely concur in the opinion expressed by Lord Moncreiff, that the trustees might well have been content to take the decision of the Court of first instance in a matter of this kind.

The Court pronounced the following interlocutor:—

"Refuse the reclaiming-note: Adhere to the interlocutor reclaimed against: Remit the cause to the said Lord Ordinary to proceed therein as accords: Find the pursuer entitled to expenses from the date of closing the record to this date; and remit the same to the Auditor to tax and to report to the said Lord Ordinary, to whom grant power to decern for the taxed amount thereof."

Counsel for the Pursuer—Balfour, Q.C.—Salvesen. Agents—J. & D. Smith Clark, W.S.

Counsel for the Defenders—Ure, Q.C.—W. C. Smith. Agents—Buchan & Buchan, S.S.C.

Thursday, June 9.

SECOND DIVISION.

[Sheriff-Substitute of Inverness, &c.

MALCOLM *v.* CROSS.

Sale—Horse—Warranty—Words of Warranty Used but No Sale Concluded till Subsequent Occasion—Rejection—Duties of Buyer after Rejection.

In an action for recovery of the price of a horse rejected by the buyer as disconform to warranty, it appeared that the buyer and seller met and had some conversation about the horse, in the course of which, as alleged by the buyer, the horse was warranted sound by the seller. Nothing further was done on that occasion, but some time afterwards the seller took the horse to the buyer and left it with him on trial. Some weeks later, the seller not having heard from the buyer, wrote inquiring whether the buyer was to keep the horse, to which the buyer replied that he was, and the following day wrote enclosing a deposit-receipt for a sum less than the price originally asked, saying that he had no doubt the seller would be satisfied with the enclosed amount. In this letter nothing was said about a warranty. The seller accepted the sum sent as the price of the horse. About six weeks later the horse was discovered to be unsound, and intimation of rejection was sent to the seller, but he refused to take it back, and it remained with the buyer until it was sold by warrant of the Sheriff more than three months after. *Held* that, even assuming words to have been used at the first interview which would have amounted to a warranty if a sale had been there and then concluded, this did not, in the circumstances, constitute the subsequent sale a sale upon warranty, and that consequently the buyer was not entitled to repetition of the price.

Question whether on the evidence words amounting in law to a warranty were proved to have been used at any time by the defender.

Observations (*per* Lord Justice-Clerk and Lord Young) (1) upon the question whether in the circumstances of this case the rejection was timeous; and (2) upon the duty incumbent upon the buyer after rejection if the seller