suggested by one of her visitors in the course of the evening, but the advice was not taken; and hence the difficulty which afterwards occurred. On the whole matter, it rather appears that, if this lady had not been so desirous of getting damages from the defender, she might by this time have had him for her husband."

The pursuer appealed, but the Sheriff (HERIOT) adhered. In a Note the Sheriff said:—"The Sheriff has carefully read and considered the evidence in this case, and he concurs in the view taken of it by the Sheriff-Substitute, that the pursuer has failed to prove her case.

"The marriage was fixed to take place on the morning of Thursday the 25th June at ten o'clock. It is said that the defender was up all Tuesday night packing the furniture, &c. It is proved that he was engaged in packing very late, and that he was also up on Wednesday morning at four, so that it would seem to be true that he was up all that Tuesday night. He called at the pursuer's about nine on the Wednesday morning, and is said to have used some angry words. He said, 'You will never go a married wife to Letham for me.' All parties, however, seem to have regarded this as a foolish and hasty expression, and not intended to break off the marriage, as he was expected to call during the day and make the final arrangements. He did not call until after eight in the evening. He explained that he had gone to bed and 'slept in.' Looking to the evidence of his sister Mrs Fyall, with whom he resided, this statement seems to have been correct. She says that he had been tasting, and was at mid-day, when he went to bed, a little the worse of liquor, which probably contributed, along with the fatigue and want of sleep, to prolong his slumbers.

"When he appeared at the pursuer's on the Wednesday evening, it turned out that he had omitted to get up the marriage-lines from the session-clerk, and that he had also forgotten to summon the minister, which it is alleged he had undertaken to do.

"The pursuer alleges that he had neglected these essentials on purpose that the marriage might not proceed on the morrow. It seems to the Sheriff that the drink and the 'sleeping in' is as good an explanation of his neglect as any desire to draw back. According to Mrs Hill's evidence, the defender, on the Wednesday night, seemed to have been quite willing to do what he could to remedy matters, and offered still to go and bespeak the minister for the morning; but one of the pursuer's sisters would not let him, 'as he had the smell of drink.' It seems to have been then arranged accordingly that the marriage could not proceed next morning, not because the defender was unwilling, but because the final arrangements were not completed.

"So far as the Sheriff can discern, the defender showed no unwillingness to proceed with the marriage. He had given her a gold watch and chain; he had also given her £30 to purchase dresses for her outfit; he had placed in her custody 100 sovereigns on which they were to commence housekeeping together; he had taken a house at Letham for them to live in after it had been seen and approved of by her; he had purchased, and despatched on the Wednesday morning furniture for the same; and he had their names proclaimed in church on previous Sabbath. In such circumstances it would be necessary for the pursuer to establish very clearly that the defender after all refused to proceed.

"Some stress is laid on what the defender said on leaving on the Wednesday night. The pursuer said to him, 'This is a pretty position you have placed me in, allowing me to send away all my clothes, except what I was to be married in.' He answered, 'I have done you no harm. You can get one of your sisters and bring back your things.' This is not a refusal on his part to proceed. It is as if he had said, If *you* don't wish to go on you may bring back your things. It was rather throwing on the pursuer the responsibility of fixing whether or not the marriage was to proceed. She fixed, and possibly she wisely fixed, that she would not go on with it; but, in such circumstances, she is not entitled to demand damages from him.

"It may be that the defender has not behaved well to the pursuer on various occasions; but this of itself is no ground in law for subjecting him in damages."

The pursuer appealed.

STRACHAN for her.

ASHER in answer.

The Court adhered, taking substantially the same view of the facts as that arrived at by the learned Sheriff. Their Lordships rested their judgment on the principle of law, that if the defender of an action of breach of promise has so acted towards the pursuer as to induce a reasonable belief that he wished to break off the marriage, he will be liable for a breach of promise. There were cases where the defender had judicially expressed his willingness to go on with the contract, but that was no answer to an action for breach of marriage, if the defender had shewn that he wished the marriage broken off. The circumstances of the present case, however, did not require the application of that test unfavourably to the defender. He had certainly acted improperly, but not so as to render himself liable for breach of his engagement.

Agent for Appellant—D. Milne, S.S.C.

Agents for Respondent—Maclachlan & Rodger, W.S.

Wednesday, March 2.

FIRST DIVISION.

SPECIAL CASE—PRINGLE'S EXECUTORS.

Widow—Terce—Conventional Provisions—Election—Acquiescence—Service to Terce. A lady, after surviving her husband for ten years, died intestate without having made her election between her conventional provisions under her husband's testamentary deeds and her right to terce. In the meantime the trustees under these deeds had consigned judicially the amount of these provisions in bank, and intimated to the lady. They had also called her as defender in an action of multiplepoinding brought for the purpose of dividing the estate of her husband, in which she made no appearance. *Held* that she had acquiesced in the provisions made for her by her husband, and that her representatives were not entitled to claim the arrears of terce.

Question—Whether, in order to transmit any right to arrears of terce to her representatives, it is necessary for a widow to have been served to the terce?

This was a special case submitted to the Court

for their opinion and judgment, by the executrices of the late Mrs Pringle of Torwoodlee on the one part, and Mr James T. Pringle of Torwoodlee on the other.

The following were the facts agreed on by the parties:—Vice-Admiral James Pringle was at the time of his death, which took place on October 31, 1859, proprietor infeft in fee-simple of the lands and estate of Torwoodlee, in the counties of Selkirk and Roxburgh. The gross rental of Torwoodlee at the date of Admiral Pringle's death, including the mansion-house, policy grounds, and shootings, was upwards of £2500. He also left moveable estate of the value—after deducting debts, &c.—of upwards of £7000. The Admiral was survived by his wife Mrs May Fraser or Pringle, and seven children. There was no contract of marriage, either antenuptial or postnuptial, between Admiral Pringle and his wife. The Admiral left the following writings of a testamentary nature:—(1) A heritable bond of annuity in favour of his wife, dated 19th February 1848, with a codicil or addition thereto, dated 13th October 1849, by which he provided to her an annuity of £520 sterling, including therein such pension or annuity as she should receive from the Admiralty in respect of her being the widow of an officer of the Royal Navy; and (2) a trust-disposition and settlement, dated 13th October 1849, with four codicils thereto, dated respectively 5th February 1851, 22d April 1854, 29th August 1855, and 23d June 1857. By the said trust-disposition and settlement, and in addition to the annuity above mentioned, Admiral Pringle directed a sum of £1000 to be paid to Mrs Pringle to enable her to purchase furniture and mournings, and as an interim alimentary allowance. Mrs Pringle did not during her survivance of the Admiral accept the provisions conceived in her favour by the writings above mentioned, or any payment to account of the said provisions apart from her pension or annuity from the Admiralty, which amounted to £120 per annum; nor did she claim her legal rights; nor did she declare her election whether to accept the conventional provisions in her favour or to betake herself to her legal claims. She never obtained herself served to the terce of the heritable subjects in which the Admiral died infeft. On April 23, 1861, the trustees consigned in the British Linen Company's Bank in Melrose the sum of £1000, provided to Mrs Pringle by Admiral Pringle's trust-disposition and settlement, to enable her to purchase furniture, and for mournings and interim aliment, with interest due thereon, less tax, amounting to £71, 2s. 5d.; and they also consigned the amount of the annuities payable to her under the bond of annuity and codicil, or addition thereto, at and prior to the term of Martinmas 1861, for the period to Whitsunday 1862, with interest due thereon, under deduction of income-tax, amounting together to £1048, 14s. 11d., after deducting the pension of £120 per annum, to which she was entitled from the Admiralty.

Mrs Pringle never uplifted these sums; and on March 1864 the trustees raised an action of multiplepoinding in which they called Mrs Pringle, the heir-at-law, and others interested in the Admiral's succession, for the purpose of having the estate distributed at the sight of the Court, and for procuring exoneration. Mrs Pringle did not enter appearance or lodge a claim in the process. The only party who did appear as a claimant was James Thomas Pringle, who lodged a condescendence and claim, in which he claimed that the trustees should execute a deed of entail in his favour of the estate of Torwoodlee, and also that the trustees should pay to him the free rents of the estate since the date of Admiral Pringle's death.

The Lord Ordinary (Ardmillan), on 8th July 1862, pronounced an interlocutor finding (1) that the trustees were bound to execute (as they declared their willingness to do) a deed of entail in favour of the said James Thomas Pringle, and the heirs-substitute of entail mentioned in Admiral Pringle's settlement of the estate of Torwoodlee, but under burden of the annuity provided by Admiral Pringle to his widow; or alternatively of her right of terce in the event of her electing to take the same, and also under burden of the heritable debts and incumbrances affecting the lands; and (2) that the said James Thomas Pringle was entitled to the whole free rents of the estate since the date of Admiral Pringle's death, under deduction of the annuity payable to Mrs Pringle, or of her terce, if she should claim the same, and of other preferable charges.

The trustees executed the entail, paid over the amount of the free rents to the heir of entail, and judicially consigned the whole sums due to Mrs Pringle up to that date, Whitsunday 1862, amounting to £2655, 5s. 5d., in the British Linen Company's Bank, on a receipt taken payable to the party or parties who might be preferred thereto, and subject to the orders of the Court, or the Lord Ordinary in the cause. After this action was brought, the said sum still remained consigned, and the receipt therefor, dated 29th February 1864, remained in the custody of the Accountant of Court.

All these proceedings were from time to time specially intimated to Mrs Pringle, who died intestate on 31st March 1869, without having made her election between her conventional provisions and the terce.

In these circumstances, the question for the opinion and judgment of the Court was, Whether Mrs Elizabeth Pringle or Borthwick, and Mrs Jane Pringle or Lawson, as executrices of Mrs Pringle, their mother, are or are not entitled to claim the terce of the heritable subjects in which Admiral Pringle died infeft, so far as consisting of subjects which by law are subject to terce, for the period between Admiral Pringle's death and the death of Mrs Pringle?

The Solicitor-General and Balfour, for the executrices, cited the following authorities:—Ersk. Prin. ii. 9, 50; Bell on Conveyancing, vol. ii., p. 796; Bell's Prin. § 1602; *Macaulay*, M. 3112; *Veitch*, M. 1687.

The Dean of Faculty and Mr Asher, in answer, pleaded that terce was an alimentary provision, the right to which did not transmit to representatives, and certainly not without service by the widow; and cited the following authorities:—Stair ii. 6, 13; *Forman*, M. 15,843; *Fea* v. *Traill*, M. 16,115; *M'Leish*, Feb. 4, 1826, S. iv. 485.

At advising—

Lord President—This a case which is very peculiar in its circumstances, and which hardly admits of the application of any general principle and rule of law. Admiral Pringle of Torwoodlee, died on 31st October 1859, leaving a large family and a widow. There had been no contract of marriage either antenuptial or postnuptial entered into by the spouses, but the Admiral left two deeds of a testamentary character—(1) a heritable bond of annuity in favour of his wife, dated in 1848, of

£520 per annum, which included the pension of £120 per annum to which Mrs Pringle was entitled as an admiral's widow. He also left (2) a general settlement, dated in 1849, in which he left her a provision of £1000 to enable her to provide furniture and mournings, &c. The position of Mrs Pringle accordingly was, that she was entitled to the option or election between these conventional provisions, and her legal rights as the widow of the Admiral to *terce* and *jus relictæ*. But the peculiarity of the case lies in this, that neither immediately after her husband's death, nor for the period of ten years which she survived him, did she exercise this right of election.

She drew her annuity from the Admiralty of £120, and upon that she lived; for she neither accepted the conventional provision of £1000 and the annuity of £400, nor did she ask for her terce or *jus relictæ*. She lived for ten years upon her pension, and then died intestate, without having made any utterance in the matter.

The question in these circumstances is, Whether her representatives or next of kin are entitled to claim the bygone terce for the whole period of her viduity? In determining this question there are some circumstances which it is important to keep in view; and *first*, one must never forget that terce is a provision of the law in favour of a widow, for the purpose of alimenting her during her viduity. Now, Mrs Pringle was called upon more than once to make her election between her conventional provisions and the terce in the most emphatic way, both by the heir-at-law and by the trustees of her late husband. Thus, on 23d April 1861, eighteen months after her husband's death, the trustees consigned in bank the sum of £1000 provided by the settlement, and also consigned the amount of the annuity up to Martimas 1861, which, as it was payable in advance, included the period up to Whitsunday 1862, and which with interest amounted to more than £1000. Still the lady did not uplift these sums, and the trustees, in March 1862, brought an action of multiplepoinding, the object of which was to have the estate disposed of at the sight of the Court, and to obtain a discharge for the trustees: one of the things which the trustees had been instructed by the deed to do was to make an entail of the estate of Torwoodlee, and there had been the greatest difficulty and embarrassment in the conduct of the trust in consequence of the widow refusing to make her election. One object of the multiplepoinding, therefore, was to make the lady declare her election between the conventional provisions and the terce.

She was called in the action along with the heir-at-law and all the others interested in the succession of the Admiral.

After the process was brought into Court the Lord Ordinary (ARDMILLAN), on May 20, 1862, pronounced an interlocutor holding the trustees liable only in once and single payment, and holding the summons and condescendence as a condescendence of the fund *in medio*, and appointing all parties claiming an interest in the fund to give in condescendences and claims within ten days; and this order for claims was renewed on June 5, 1862. Special intimation of both of these interlocutors and orders for claims, with copies thereof, was sent by the agents for the trustees to Mrs Pringle on 6th June 1862, but she returned no answer thereto.

She was thus fully certiorated of what was done, that the distribution of the estate was going on, and that what was due to her had been consigned, yet she lodged no claim, and made no appearence in the action.

The trustees continued to consign, half yearly as it became due, the annuity payable to her; an entail was then executed, and the whole sum consigned, amounting with interest to £2655, was under an interlocutor of the Lord Ordinary, after intimation to the lady, judicially consigned in the British Linen Company's Bank, on a receipt taken payable to the party or parties who might be preferred thereto, and subject to the orders of the Court. It is only necessary to add, that after consignation the trustees got their discharge, the accounts of their intromissions having been sent to the auditor, who reported that there was in the hands of the trustees a balance of free rents of the estate of Torwoodlee from the date of the Admiral's death to the date of the execution of the entail, amounting to £460, 1s. 3d., and this balance, on 14th March 1865, the Lord Ordinary decided that the trustees should pay over to the heir of entail.

During all this time Mrs Pringle maintained her attitude of silence, but it appears to me that, in the face of all these proceedings, we must attach a weight and significance to this silence. Silence often means acquiescence. It appears to me that when this lady, with full intimation, allowed her provisions to be judicially consigned without any objection, and further submitted without remonstrance to a payment by the heir of entail of the balance of free rents, she must be held to have abandoned her claim to terce. But she lived on for four years after this, from 1865 to 1869 upon her pension without making any remonstrance, or indeed any utterance of any kind, and it appears to me that, whether she would have been barred from making a claim for terce by her long acquiescence, that certainly her right to make a claim for terce has not been transmitted to her representatives.

Her proceedings show that she did not intend to claim her terce; she did not require it for her aliment. If she wished a larger income, she knew that those consigned sums were lying in bank for her benefit, and she failed during all this time to intimate her repudiation of the conventional provisions.

All these circumstances are conclusive to my mind against the claim of her representatives in this case. If it were not for these special circumstances, questions of great general importance and difficulty would arise in this case, regarding the steps which it is necessary for a widow to take during her viduity, in order that the terce may vest in her person and be capable of transmission to her representatives, and it is a great relief to me to find in the circumstances of this special case ample grounds for judgment, without entering into any consideration of these very difficult questions.

LORDS DEAS and ARDMILLAN concurred.

LORD KINLOCH—This case was presented to us at the bar as involving some legal questions of great importance, and particularly that very general one, whether a widow who had not served to her terce during her lifetime transmitted to her representatives a right to the third of the rents during her survivance against her husband's heir. I carefully considered the questions discussed before us; and had matured an opinion upon them: but I have come to think, with your Lordship, that

all necessity for pronouncing on these points is precluded by the special circumstances of the case.

Unquestionably the late Mrs Pringle was originally entitled to elect to take her legal right of terce in preference to the provisions in her husband's settlement. But she was bound, in fairness to those interested, to intimate her election without delay. And if she intended to claim her legal right of terce, she ought openly and distinctly to do so. She could not reasonably keep hanging over the head of the heir a claim for terce, with, in all probability, five per cent. interest on last term's rents, for a wholly indefinite period. In the present case she was the more imperatively called on to come forward with a claim by the fact of the annuity due under the settlement being within her knowledge assigned from term to term for her use. Though she did not formally accept the tender, she never in any way rejected it. She never made any claim to terce, either by formal process or informal demand, during all the ten years that she survived her husband. She allowed the money assigned in bank to meet her annuity under the settlement to lie unrepudiated till her death. In this special condition of things, I consider it to be a sound conclusion, that no claim for terce was intended to be made by her; that the only claim which can be now held to have been kept up is that for the annuity under the settlement; and that this claim, and this only, was transmitted by her to her representatives.

I do not, in so holding, indicate any opinion either that silence is necessarily to transmit to a widow's representatives a claim against her husband's heir for one-third of the rents during her survivance; or that, where matters are entire, these representatives have not the same power of electing between the terce and other provisions primarily competent to the widow herself. All that I decide is, that in the special circumstances of the present case no claim of terce was transmitted to her representatives by Mrs Pringle.

The question was accordingly answered in the negative.

Agents for Pursuers—Messrs C. & A. S. Douglas, W.S.

Agents for Defenders—Messrs Romanes & Paterson, W.S.

Saturday, February 26.

SECOND DIVISION.

POLLOK *v.* CASSIDY.

Master and Servant — Injury to Person — Culpa. Circumstances in which an employer *held* liable in damages, in respect he had not provided proper measures for the protection of his workman, who sustained injuries in consequence.

This was an appeal from the Sheriff-court of Hamilton. The action was one brought by a workman against his employer, concluding for damages for personal injuries; and the question was, whether the injuries were sustained through the fault of the employer? It appeared that the pursuer was on 22d June 1868 engaged by the defender's orders in removing from the empty bed of the Monkland Canal certain stones and loose mason work which had formed part of the pier of a bridge recently taken down. There was a high clay embankment immediately behind the said pier, and which had previously rested on it, and it was at the foot of this embankment that the pursuer had been set to work. While the pursuer was at work on the day in question, a portion of this embankment fell upon him, and injured him so severely that his leg had to be amputated. The pursuer alleged that it was the defender's duty to have made provision for the safety of his workmen by having the embankment sloped back in such a way as to obviate the danger of its falling. The defender, on the other hand, alleged that the danger had been as obvious to the pursuer as to him, if there was danger, and maintained generally that the accident was due to the pursuer's own negligence.

The Sheriff-Substitute (VEITCH) found for the pursuer, and awarded him £25 damages. The Sheriff (BELL) adhered, but increased the damages to £50.

The following is the interlocutor of the Sheriff:—"Having heard parties' procurators on their respective appeals, and considered the proof and whole process—Finds that at the time the pursuer sustained the injuries for which he seeks reparation he was engaged, by the defender's orders, in whose employment he was, in removing from the empty bed of the Monkland Canal certain stones and loose mason work which had formed part of the pier of a bridge recently taken down: Finds that there was a high clay embankment immediately behind the said pier, and which had previously rested on it, and it was at the foot of said embankment that the pursuer had been set to work: Finds that, the support of the pier being withdrawn, a part of the embankment gave way and fell on the pursuer, and injured him so severely that one of his legs had shortly thereafter to be amputated: Finds it proved that the embankment, as soon as the pier against which it rested was removed, became dangerous, and ought to have been cut down, or at all events duly sloped, before any one was allowed to work beneath it: Finds that it is not proved that it had been so cut down or sloped, and it is not proved that the plan, No. 9—prepared, not from actual observation, but from statements furnished by the defender—contains a correct representation of the embankment at the time of the accident: Finds, on the contrary, that the pursuer depones as a witness *in causa*—'When the pier was removed the embankment was left exposed: it was nearly perpendicular, but rather inclined to the side of the canal where we were working. We were occupied in digging out a stone with picks. I was stooping down with my face towards the canal, and back towards the embankment. Some of the embankment came down upon me, and knocked me down into the bed of the canal:' Finds that this evidence is expressly contradicted by that of the pursuer's two fellow-workmen, John Garretty and Owen Reilly, and is consistent with probability, whereas it is hardly possible that any debris, or any portion of the embankment, could have fallen on the pursuer had it been sloped back in the manner delineated in said plan: Finds that the rule of law is, that 'while a servant is required to consider his liability to an injury by the carelessness of his fellow-workmen as one of the incidents of his employment, the risks of which he has aasumed in contracting with his employer, he is equally entitled to expect that the master, on his side, will do his duty towards him, by taking all