which pursuer was found entitled in the second action *pronounced* in name of the agent-disburser, although the taxed expenses in the first action had not been paid.

Henry Stuart, pantomimist, sued H. E. Moss in the Sheriff Court at Edinburgh for damages for breach of a contract by which Stuart was to have performed at Moss' (defender's) theatre. Stuart was unsuccessful in this action, and was found liable in expenses, which were taxed at £35. Moss in the course of the correspondence by which he broke off the engagement with Stuart made use of certain expressions which were founded on by Stuart as slanderous, and for which he raised the action of damages reported *supra*, p. 231. After issues had been adjusted on a reclaiming-note, and the case remitted for trial to the Outer House, Moss moved the Lord Ordinary (Lee) to postpone the trial until Stuart had paid the expenses in the Sheriff Court action. The Lord Ordinary refused the motion.

"*Note.*—In the event of the defender intimating to-morrow his intention to reclaim, the pursuer offered to consent to a delay to the 19th February to enable the reclaiming-note to be disposed of. My reason for refusing the motion as made in the present action is entirely independent of and unconnected with the Sheriff Court action for breach of contract. The case in this respect is different from *Irvine* v. *Kinloch*, November 17, 1885, 13 R. 172, and cases there cited."

Moss reclaimed.

At advising—

Lord Justice-Clerk—This case is not at all in the same category as *Irvine* v. *Kinloch*. Here the two actions are totally distinct. One is an action of damages for breach of contract, and apparently one of the parties to that action wrote a letter to the effect that the other party was of no use in his profession. He professed to be manager of a troupe of actors, and the statement was that they were not up to the mark, and for this alleged slander he has brought the present action of damages. He was unsuccessful in the other action, and has been found liable in expenses, and the motion now is that payment of these expenses should be a condition of proceeding to trial in the action founded on the alleged slander. I can see no ground for sisting this action till these expenses have been paid when the two actions are so completely different, and therefore think we should adhere to the Lord Ordinary's interlocutor.

Lord Young, Lord Craighill, and Lord Rutherfurd Clark concurred.

The Court adhered, found the pursuer entitled to the expenses of the reclaiming-note, and remitted the same for taxation.

Decree for the taxed expenses, amounting to £15, was moved for in name of the pursuer's agent as agent-disburser. The defender resisted the motion, pleading that he was entitled to set off the expenses to which he had been found entitled in the Sheriff Court. Authorities—*Portobello Pier Company* v. *Clift*, Nov. 16, 1877, 4 R. 685; *Paterson* v. *Wilson*, Dec. 20, 1883, 11 R. 358.

The Court granted decree in name of the agent-disburser.

Counsel for Pursuer—A. S. D. Thomson. Agent—M. J. Brown, S.S.C.

Counsel for Defender—Rhind—Baxter. Agent—Robert Menzies, S.S.C.

Tuesday, March 16.

SECOND DIVISION.

[Lord M'Laren, Ordinary.

MILLER AND OTHERS *v.* DENHAM AND OTHERS (GALBRAITH'S TRUSTEES).

Succession—Legitim—Election of Testamentary Provisions—Election—Consent of Husband to Wife's Election—Married Women's Property (Scotland) Act 1881 (44 *and* 45 *Vict. cap.* 21).

After the death of a truster his two married daughters at a meeting of his trustees, which they had been asked to attend, signed a minute of the meeting bearing that after the whole circumstances had been explained they had accepted the provisions made by the will in their favour. They had not consulted their husbands as to their position in the matter. They subsequently brought an action of accounting against the trustees, concluding also for reduction (if necessary) of the minute. *Held* (1) that the minute was not binding, because it was signed without their consulting their husbands as to their position, and (2) that it did not form a bar to the action of accounting, and need not be reduced as a condition of proceeding with the action of accounting.

John Galbraith, iron-broker, Glasgow, died on 15th September 1883 leaving a trust-disposition and settlement and codicil thereto dated respectively 4th and 9th September 1883. By this settlement he conveyed to trustees, named therein, in trust, all and sundry the whole means and estate, heritable and moveable, of which he might die possessed. The purposes of the trust were, *inter alia*, for payment of the testator's debts and funeral expenses and certain legacies, and payment to his daughter Miss Margaret Galbraith of a free alimentary annuity of £20 during her life. The trustees were directed to hold the residue of his estate for the benefit of his two married daughters Mrs Jane Miller and Mrs Mary Martin, one-half to each for their respective liferent uses allenarly, and payable on their own receipts alone, the shares of each to be payable equally among their respective children in fee. The settlement declared that the provisions in favour of his children "shall be accepted by them in full of legitim, and all other claims competent to them, or any of them, against my estate; declaring that, in the event of any of my children claiming legitim, the child or children so claiming, and the issue of such child or children (except the said Jeanie Livingstone [a natural child of one of his daughters]), shall forfeit the whole provisions herein conceived in favour of such child or children or their issue."

The testator left no heritage. The moveable

estate was given up for confirmation at £2674, 5s. 2d.

On 7th November the trustees resolved to have a meeting with the three daughters on the 14th November as to the estate, and the daughters having been requested to attend, they were at a meeting on 14th November. This meeting took place in the office of the law-agents of the trust. The minute of this meeting was as follows:—"It was explained that this meeting was called for the purpose of furnishing information to the daughters of the deceased, and the whole circumstances of the estate were gone over and explained to the daughters. After consideration, Mrs Miller and Mrs Martin agreed to accept of the provisions conceived in their favour by their father's will, but Margaret Galbraith, the deceased's daughter, intimated that she claimed her legitim." Mrs Miller and Mrs Martin signed the minute. Upon the same day Mrs Miller and Mrs Martin subscribed a minute endorsed upon an extract of the settlement and codicil to the effect that they "having, at a meeting of our father's trustees to-day, heard full explanations as to his estate and of our legal rights, do hereby renounce the same and accept of the provisions within conceived in our favour, and ratify and confirm our father's trust-disposition and settlement and codicil." Afterwards, in the early part of 1884, Mrs Miller and Mrs Martin called upon the trustees to settle with them on the footing of their taking their legal rights, which the trustees refused to do. Mrs Miller and Mrs Martin then, with the consent and concurrence of their husbands, and the said husbands for their own right and interest, raised this action against the trustees. The summons concluded for an accounting of the trust-estate and payment to each pursuer of £2000 as the balance due to her, and, if necessary, for reduction of the minute of meeting of 14th November. A supplementary reduction of the minute by the pursuers endorsed on the codicil was afterwards brought.

The pursuers averred that at the date of their meeting with the trustees they were ignorant of the amount of the trust-estate, and that at that time it was represented to them that their share under the settlement would be worth £32 per annum, but that they now found it would be worth only £20 per annum; that they did not know their legal rights, nor were these explained properly to them; that they were under essential error as to them, and that in signing the minute as they did they acted without the advice of their husbands or any independent advice.

The defence was that the pursuers had accepted the testamentary provisions made in their favour, and that they did so after full information before the meeting as well as at it, and in full knowledge of the circumstances.

The pursuers pleaded, *inter alia*—"The female pursuers' alleged election to take under the will having been without the consent of their respective husbands, the same is of no effect."

At the proof both female pursuers deponed that they had acted without consulting their husbands. Their husbands gave evidence to the same effect, and there was no opposing evidence on the point.

The female pursuers also deponed that they had no time to consider given them at the meeting, and did not understand properly their rights or the result of their election.

They deponed that they would have been content to abide by the will had they received, as they were told would be the case, £32 per annum of interest, but this not being the case they were unwilling to do so.

It appeared from the note taken by the agent at the time that the meeting lasted two hours, and the evidence for the defence was to the effect that every endeavour was made to give full information, and that no promise as to £32 of annual income was given.

The Lord Ordinary (M'Laren) pronounced this interlocutor:—"Finds that the pursuers have failed to prove that they signed the minute of 14th November 1883 libelled in ignorance of their legal rights, and that the acceptance of the provisions under their father's settlement was to their lesion; therefore assoilzies the defenders from the conclusions of the action of count, reckoning, and payment, and reduction, and also from the conclusions of the supplementary action of reduction, and decerns, &c.

"*Opinion.*—After hearing the argument I have formed a clear opinion on this case, and it is therefore unnecessary that I should take time to consider it. The case is one of those that so often arise from a discordance between the rules and principles of our succession law and the practice of conveyancers. The law gives to the lawful children of a testator, under the name of legitim, one-half or one-third of his estate, of which the children cannot be deprived except by their own consent or by a pre-nuptial arrangement. But the practice has grown up of advising testators to make wills just as if this right did not exist. I have often thought it would be much better if a father who has not excluded the right of legitim in his lifetime, would just recognise it, and by his will only deal with the half or third of the estate that he is free to dispose of. But in this case the usual practice was followed of disposing of the whole estate, and then endeavouring to make that disposition effectual by a clause of forfeiture, a clause which I think is not happily conceived with reference to the disposition which the father intended to make. Now, on the father's death the right of election arose to his three daughters. One of them who under the will got an annuity, elected to take her legitim at once. She had no difficulty in understanding what her legal rights were, and she made the election that was for her immediate as distinguished from her ultimate interest. Here, again, one cannot help wishing that the law of legitim would allow a father to give the value of the legitim in the form of an annuity. No one is more favourable to the existence of legitim than I am; but it is unfortunate that it should not be capable of being given in the form of an annuity, and that the father should have to look forward to the inevitable election of a weak or dissolute child. As regards the two married daughters, I really see no reason to doubt that they were fully informed as to the amount of the father's estate, as to its disposition under his will, and as to the rights which they would have if they chose to ignore the will. And having these elements of information before them, they were intelligent enough and quite able to draw all necessary inferences from

the facts. To say nothing of mere casual interviews, there were two meetings, one on the 4th and another on the 14th November; and it appears that the meeting of 14th November was specially called at the request of the trustees in order that there might be no dubiety as to the election of the testator's daughters. The trustees were aware that this kind of question frequently arises, and were determined they would do what they could to prevent it arising here. The meeting lasted two hours, as we were told, and everyone except the ladies themselves say that they were fully informed, and they perfectly understood the conditions on which their election was to arise. I think it is the fair import of the evidence both of Mrs Miller and Mrs Martin that they were in possession of the terms of their father's settlement, and also of the nature of the rules of law applicable to legitim, and that they quite understood that they were to choose between an annuity given under the will and a share which might be a half, and might ultimately be the whole of the residue, in the event of their leaving the estate to the operation of the law. But their position, as stated in evidence, is not that anything was kept back from them, either as to the facts or the law, but that they had agreed to take under the will on condition that they were assured of an annuity of £32 a-year each out of the estate; in short, that they were to be guaranteed a fixed income of £32 a-year by the trustees and their agent. They do not use these words, but that is the meaning of what they say. I am quite sure that the trustees and their agent never gave any assurance of that kind—that they only gave an estimate of the probable income of the estate; and I am also satisfied that these two ladies are quite mistaken in their belief as to what that interest was. It was £25, and not £32, and the result has shown that the estimate given was perfectly correct. How the mistake arose I cannot say, but I think it has arisen since the meeting of 14th November, and that on that date Mrs Miller and Mrs Martin quite understood what the probable income of the estate would be, viz., £50, or £25 to each. Therefore, without considering any of the ulterior questions, I am prepared to decide the case upon the ground that an irrevocable election has been made in the full knowledge of all necessary facts and circumstances. I may add, however, that I come to this conclusion without regret, because I am convinced that no real injury has resulted to these ladies from their election. It is much better for them that they should have a small fixed return from their father's estate than that they should be put in possession of a capital sum which might possibly be spent by themselves, or might go to creditors in certain contingencies. I have no confidence at all in the view that was suggested on behalf of the ladies, that they might by electing legitim also come into possession of the dead's part. Having regard to the case of *Gillies*, decided by the Second Division of the Court [*Gillies* v. *Gillies' Tr.*, Feb. 23, 1881, 8 R. 505], I think we should probably have found means to defeat a claim of that kind, which would obviously be very unfair to the ladies' children, and would amount to giving to the right of legitim an extension far beyond what the law contemplated. It appears to me that no person who is claiming legitim can ever found upon the will for the purpose of taking a benefit to himself. That rule will equally strike at such a claim as is made here, founded on a clause of forfeiture, as it would strike at any claim founded upon direct words of bequest. A person who is claiming legitim in opposition to the scope of the will is as much disabled from taking benefit by the forfeiture of the right of another, as he is disabled from taking benefit from a bequest to himself, and I cannot see how these ladies could put forward the forfeiture of their children's provisions, resulting from their own act, in order that they might themselves take the money in the character of representatives in intestacy. But in the view I have taken these considerations do not enter into this case, except so far as to show that there has been no lesion, and therefore upon another ground to negative the reductive conclusions of the two actions. Upon the whole case I shall assoilzie from the conclusions of the summons in the original action and the supplementary action of reduction, and find the defenders entitled to expenses."

The pursuers reclaimed, and argued—The pursuers had signed the minute of 14th November under essential error. They did not understand what the results of their action would be. They thought that the interest on the estate would yield them an annuity of £32, whereas it was found that it would only yield them interest to the amount of £25 per annum. As the pursuers had signed the minute renouncing their legitim without their husbands' consents the minute ought to be reduced. The provisions of the Married Women's Property Act 1881 did not influence this case, as the pursuers were married before 1881.

Argued for the defenders—The proof showed that these ladies had understood quite well what they were doing when they signed the minute, and the trustees could not pay them their legitim in opposition to the terms of that minute without judicial sanction. A husband was not entitled to interfere with the actings of his wife in considering whether she should elect to take her legitim or the provisions under a settlement.—*Macfarlane* v. *Oliver*, July 2, 1882, 9 R. 1138; *MacDougal* v. *Wilson*, Feb. 20, 1858, 20 D. 659; *Lawson* v. *Young*, July 15, 1854, 16 D. 1098; *Stevenson* v. *Hamilton*, Dec. 7, 1838, 1 D. 181. They referred to the Married Women's Property Act 1881 (44 and 45 Vict. cap. 21), sec. 1, which provides—"(1) Where a marriage is contracted after the passing of this Act, and the husband shall at the time of the marriage have his domicile in Scotland, the whole moveable or personal estate of the wife, whether acquired before or during the marriage, shall by operation of law be vested in the wife as her separate estate, and shall not be subject to the *jus mariti*. (2) Any income of such estate shall be payable to the wife on her individual receipt or to her order, and to this extent the husband's right of administration shall be excluded; but the wife shall not be entitled to assign the prospective income thereof, or unless with the husband's consent, to dispose of such estate."

At advising—

Lord Young—This case is too clear for argument. The facts of the case are very simple. The testator, John Galbraith of Glasgow, died on

15th September 1883 leaving a family of three daughters, two of whom are married, and we do not need to inquire further into the facts than to say that by his settlement, made in September 1883, he provided an annuity to one daughter and liferents to the other daughters. The first-mentioned elected to take her legitim. The other two, without their husbands' consents, and seemingly without consultation with them, attended a meeting of the trustees appointed by the settlement at the office of the law-agent to the trust on 14th November 1883, and at that meeting these two married ladies put their names to a minute which states—"After consideration, Mrs Miller and Mrs Martin agreed to accept of the provisions conceived in their favour by their father's will, but Margaret Galbraith, the deceased daughter, intimated that she claimed her legitim." This minute was signed by the female pursuers in the office of the law-agent of the trust, and I have no reason to doubt the integrity and probity of his intentions, and that he thought this arrangement was for the benefit of all parties concerned. And indeed I have no great reason to think that he has made any mistake in so thinking. But this minute was signed by these ladies in the absence of their husbands, to whom no communication had been made. No copy of the deceased's will, nor any note of what the amount that their wives would be entitled to receive under it, had been sent to them.

These ladies now bring an action of accounting for their rights under their father's settlement, with a subsidiary conclusion to have the minute of 14th November reduced. It is pleaded as an obstacle to their success in this action, and has been argued at the bar, that these ladies having accepted their testamentary provisions cannot now claim their legal rights.

I am of opinion that the fact of their having signed that minute is no obstacle whatever to their having an accounting, and no obstacle whatever to their taking their legal rights instead of accepting the provisions under their father's will, if that should be found to be the best for them. I should have no doubt whatever that if as a result of the accounting a reduction of the minute of 14th November should be needed, it could be reduced on account of the want of the husband's agreement thereto, but I do not think it necessary that we should reduce the minute in our judgment.

But the interlocutor of the Lord Ordinary finds "that the pursuers have failed to prove that they signed the minute of 14th November 1883 libelled in ignorance of their legal rights, and that the acceptance of the provisions under their father's settlement was to their lesion; therefore assoilzies," &c. Now, I think that is altogether wrong. The minute is no answer to an action of accounting, and would be no obstacle to allowing these ladies to elect to take their legal rights rather than their conventional provisions, if it shall yet appear that they wish to do so. I am therefore of opinion that the Lord Ordinary's interlocutor should be recalled.

Lord Craighill—I am of the same opinion. Of the two forms of judgment I should in the circumstannces prefer that which has the preference in your Lordship's views. There does not appear to be any need to reduce this minute in the meantime. It has not been recorded, and will not be recorded, and the more entire things are left during the accounting the better for all concerned.

Although not very familiar with the provisions of the Married Women's Property Act 1881, I am somewhat startled by the contention maintained on the part of the defenders here, that an absolute right to elect between conventional provisions and legitim belonged to the wife, to such an extent that the husband was not entitled even to expect the courtesy of being consulted, and that when the matter came to be closed the consent and concurrence of the husband was not a necessity to the validity of the transaction.

The Act of 1881 has gone a great way to make the wife the owner of property that comes to her by succession, and consequently claims which before the passing of the Act the husband had to his wife's legitim no longer exist. Section 1, sub-section 2, seems to make it a condition, however, that she shall not transact with reference to such property, meaning by transacting that she shall not part with what is to come to her without her husband's consent. Now, if this section is to have any effect it must be applicable here. By law these ladies took legitim; by the settlement they took conventional provisions on condition of surrendering legitim. By the minute of 14th November 1883 they gave up their legitim and accepted of the conventional provisions. It embodied a transaction, therefore, by which they parted with something which was theirs by legal right. That they could not do before 1881 without their husbands' consent, nor can they do so now.

I quite see the position of the trustees in this matter. They have a responsibility to others than these ladies, and they are entitled to ask for judicial authority before they allow what was arranged on 14th November 1883 to be gone back upon. That authority only our judgment will give them, and things will be restored to the same position as if the minute had not been executed.

Lord Rutherfurd Clark—I agree. I think that the minute was not binding upon the pursuers in this action, because these ladies' husbands were not made parties to it, and that both by common law and under the statute it was necessary to have the husbands' consents to the minute to make the consents of the wives effectual.

The Lord Justice-Clerk was absent.

The Court pronounced the following interlocutor:—

> "Find that the minute of 14th November 1883 libelled is no bar or impediment to the conclusions of the action for count and reckoning, or to the claims of legitim, if as the result of the accounting these shall be made; therefore recal the interlocutor reclaimed against: Find the pursuers entitled to expenses from the date of the said interlocutor . . . *quoad ultra* remit the cause to the Lord Ordinary with instructions to proceed therein as accords," &c.

Counsel for Pursuers—Rhind—A. S. D. Thomson. Agent—William Officer, S.S.C.

Counsel for Defenders—Pearson—Low. Agent—Ronald & Ritchie, S.S.C.