that his own means were exhausted, the trustee might not have negatived the likelihood that if action had been raised, the debt would have been recovered, especially if it touched the honour of the debtor. But the present case is in strong contrast to that which I have figured. The sequestrated estate of Elliot is not expected to pay any dividend at all. He is about 70 years of age. He had been in pecuniary straits for years. He had borrowed from friends, but seems to have come to an end of his resources in that quarter before 1895, and to have betaken himself to less defensible methods. "He paid pressing creditors by taking from one client to pay another."

Now, on this evidence I am prepared to hold that the defender has made out his case. The only suggestion to the contrary which is at all consistent with the facts comes to be, that if the defender had sued Elliot for the £200, Elliot would have stolen the money from some third party, and have paid it to the defender. I own that there is great plausibility in this conjecture. But in such a surmise I feel myself to be out of the region of legitimate inference.

The only other suggestion of possible aid coming from friends arises from the fact that in November 1895 some claim by people called Purvis's trustees was bought off at 5s. per £ by General Boswell, a brother-in-law of Elliot. We do not know anything but the fact, and I am unable to infer from this that General Boswell would again have intervened, or that any other General Boswell was available. The *onus* on the defender cannot impose on him the necessity of negativing such remote conjectures.

My opinion on the whole case is, that in February 1895, and certainly before Whitsunday 1895, it was the duty of the defenders to take steps for the recovery of the £200, and for the interception of the Whitsunday rent of Bellevue; that his omission to do so constitutes *culpa lata;* that he is liable for the Whitsunday 1895 rent of Bellevue, with interest from that date, and that no loss has been sustained by the trust-estate through the omission of the defender in the matter of the £200. The pursuers claimed from the defender two other half-years' rents of Bellevue. As these rents fell due and were ingathered by Elliot before the defalcation of the £200 and its discovery, some *culpa lata* must be formed to support this demand other than that which I hold proved. I have only to say that I think the pursuers' case on this head has entirely failed, but even if it had not, the same defence would avail the defender as I sustain regarding the £200. In my view the Lord Ordinary's interlocutor must be recalled and decree granted for the Whitsunday rent of Bellevue with interest, the defenders being *quoad ultra* assoilzied.

LORD ADAM and LORD KINNEAR concurred.

LORD M'LAREN was absent.

The Court pronounced the following interlocutor:—

"Recal the interlocutor" of 19th January, "decern against the defender for payment to the pursuers, as trustees foresaid, of the sum of £30, 17s. 6d., being the rent of Bellevue due at Whitsunday 1895, with interest thereon from said term until paid at the rate of 5 per centum per annum: *Quoad ultra* assoilzie the defender: Find no expenses due to or by either party, and decern."

Counsel for the Pursuers — Salvesen—W. Thomson. Agents — M'Naught & M'Queen, S.S.C.

Counsel for the Defender — Shaw, Q.C. —Watt. Agents—Winchester & Nicolson, S.S.C.

Saturday, July 10.

FIRST DIVISION.

CHALMERS' TRUSTEES *v.* SINCLAIR.

Minor and Pupil—Curator—Capacity of Married Woman to Act as Curator to a Minor.

Held (*per* Lord President and Lord Adam, *diss.* Lord Kinnear) that a married woman is incapable of acting as a curator to a minor.

Kerbechill v. *Kerbechill*, 1586, M. 9585; *Marquis of Montrose*, 1695, 4 Br. Supp. 277; and *Stoddart* v. *Rutherford*, 30th June 1812, F.C., *commented on.*

By trust-disposition and settlement and relative codicils, Patrick Henderson Chalmers of Avochie, who died in 1889, nominated his wife and certain other persons to be his trustees and executors.

The truster left two sons, the elder born in 1882, the younger in 1888.

The following were the truster's provisions with reference to the guardianship of his children:—"And I hereby appoint my wife, the said Mrs Emma Jane M'Donell or Chalmers, to be sole tutor and curator during all the days of her life, but so long only as she shall remain unmarried, to our child or children, and from and after the death of my said wife I appoint [the other trustees], and in the event of the second marriage of my said wife, she shall cease to act as sole tutor and curator to our child or children, but she shall act along with those herein above appointed to act from and after her death, and the survivors and acceptors, or survivor and acceptor, to be tutors and curators or tutor and curator to our said child or children, with the fullest powers, privileges, and exemptions, declaring that such tutors and curators shall not be liable for omissions nor the one for the other, either *in solidum* or *pro rata*, but each for his or her own actual intromissions with the means and estate under his or her actual charge and administration."

Upon the truster's death his widow accepted of the office of tutor to her sons, and acted as sole tutor to them until her

second marriage to Mr Sinclair in 1891. Thereafter she acted as tutor in conjunction with the other trustees.

The eldest son having attained minority on 1st June 1896, this special case was presented by Mr Chalmers' trustees, first parties, and his widow, now Mrs Sinclair, second party, to determine the question :—"Is the party of the second part entitled, jointly with the first parties, to the office of curator of her minor son of the marriage between her and the deceased Patrick Henderson Chalmers, and to perform the duties of the said office?"

Argued for the first parties — A married woman was incapable, according to the law of Scotland, of acting as curator to a minor — Ersk. Inst., i, 7, 12; Stair, i, 6, 24; Bankton, i, 7, 30; Fraser, Parent and Child, 346. The theory of this well-established principle was that one who is herself under curatory cannot be a curator to others; and the rule was given effect to in the old cases of *Kerbechill* v. *Kerbechill*, 1586, M. 9585, and *Marquis of Montrose*, 1695, 4 Br. Supp. 277. It was true that in *Stoddart* v. *Rutherford*, 30th June 1812, F.C., it was held that women were capable of acting as trustees, and that Lord Meadowbank had there denied the existence in the law of Scotland of the rule now contended for. But Lord Glenlee had been careful expressly to assert its existence; and in any event the decision in *Stoddart* did not go beyond the office of trustee. A curator might have much more arduous and delicate duties to perform than a trustee. The Act 1696, cap. 8, did not impose the incapacity in question, because that incapacity was already well established in law. The second party relied on the Guardianship of Infants Act 1886, and the case of *Campbell* v. *Maquay*, June 27, 1888, 15 R. 784. But if the Legislature had intended to alter the common law with regard to women acting as curators, as it had undoubtedly altered the law with respect to their acting as tutors, the statute would have said so expressly. It was a dangerous principle to disregard old and unchallenged decisions on the ground that they were inconsistent with modern legal opinion—*Campbell, ut sup., per* L. P. Inglis, p. 787.

Argued for the second parties—There was no authority for the proposition that a married woman could not act as a curator, except the one statement of Mr Erskine (Inst. i. 7, 12). *Kerbechill, ut sup.*, dealt with tutory, and the law as to tutory had been admittedly altered; the case of the *Marquis of Montrose, ut sup.*, had never even been decided. The Statute 1696, cap. 8, imposed no such incapacity on married women, which it might well have done to settle the case of the *Marquis of Montrose*. On the contrary, it gave unqualified power to a father to appoint any one whom he pleased as curator to his minor children. But even if Mr Erskine's doctrine were borne out by authority, the foundation on which it rested had been demolished in the case of *Stoddart*. The reasoning of the Court in that case applied equally to curatory with the office of trustee, and Lord Meadowbank had explicitly repudiated Mr Erskine's view. Subsequently to *Stoddart*, a married woman had been found capable of acting as *factor loco tutoris* and as *curator bonis—Lambe* v. *Ritchie*, December 14, 1837, 16 S. 219; *Anderson*, January 31, 1829, F.C. p. 445. Assuming that the disability once existed, it had long been obsolete; and the present state of the law was settled by the spirit if not by the letter of the Guardianship of Infants Act 1886, as interpreted by *Campbell, ut sup.*

At advising—

LORD ADAM — [*After narrating the facts, his Lordship proceeded*] — These being the facts, the question of law which has arisen is whether Mrs Sinclair, who is the party of the second part, is entitled jointly with Mr Chalmers' trustees, who are the parties of the first part, to the office of curator of her minor son, and to perform the duties of the office—the ground of objection being that a married woman is not entitled to act as a curator. The earliest case on the subject to which we were referred was that of *Kerbechill* in 1586. In that case Kerbechill pursued for delivery of the pupil who was his nephew. The application was opposed by the child's mother, who pleaded that she was *tutrix testamentaria*, to which it was answered *inierat secundas nuptias*, and she replied that it was expressly provided that she should be tutrix albeit she married again. The Lords found that notwithstanding this provision the common law ought to be followed forth and that her tutory testamentary fell *per secundas nuptias*. If this be still law, it appears to me to be directly in point, because I do not think any distinction can be taken between a case of tutrix and a curatrix as in this case.

The same decision was repeated in 1636 in the case of *Stuart* v. *Henderson* (M. 9585). In that case Stuart, who had been served and returned as tutor-at-law to the children of his late brother, pursued his brother's widow for exhibition of certain bonds belonging to the pupil in her hands. She had been appointed by her husband tutrix to the children, but had married again. She pleaded that she had not ceased to be tutrix because her husband had nominated her to be tutrix during the whole time of their pupillarity as well after her second marriage as during the time of her widowhood. The Lords, however, found that notwithstanding this provision of the testament she had tint her office by her second marriage.

The next case on the subject to which we were referred was that of the *Marquis of Montrose* in 1695. The Marquis had nominated his mother as one of his curators along with others. The Lords thought she being clad with a husband could no more be a curator than a minor could be, not having a person in law. The rest of the curators then present were sworn *de fideli*, but her ladyship's nomination was forborne till it was further considered. But it does not appear what the

result of such further consideration was, if there was any.

Lord Stair, i. 6, 24, says that tutory is finished by the marriage of a tutrix-testamentar, which no provision, even of the testator, can dispense with.

Mr Erskine, i. 7, 29, says that the office both of tutory and curatory expires by the marriage of a female tutor or curator.

I think the latest case in which this matter has been adverted to is that of *Campbell* v. *Maquay* in 15 R. 784, in which the late Lord President, in commenting on the second section of the Guardianship of Infants Act, said—"It is said that that section must be read under reference to the common law which makes it a disqualification for a mother to act as her child's guardian if she marries a second time. The rule so decided is quite distinctly laid down in decisions pronounced in the 16th and 17th centuries, and it may truly be said that nothing has ever been done in later times to shake these authorities. But one cannot help seeing that these cases were founded, not on the principles of common law or equity, but entirely on the authority of the Roman law. The earliest of the decisions to which we were referred —the case of *Kerbechill*—is particularly remarkable as illustrating that fact. It was argued that we should disregard these cases, as the spirit which inspired them is irreconcilable with the spirit of modern legal opinion. That is a somewhat dangerous doctrine to adopt, and I am not disposed to rest my judgment on that ground."

I agree with the Lord President that nothing has been done in recent times to shake the authority of these cases. The only case to which we were referred as having done so was that of *Stoddart*, June 30, 1812, F.C., in which it was held that a married woman might legally be named a trustee. It was said that the reason of the thing applied equally to a married woman being a trustee and to her being a tutrix or curatrix. But the Court in that case distinguished between the two cases. Lord Glenlee in particular said—"I conceive it to be fixed that if a man means to make a married woman tutor or curator he cannot do so. But it is quite a different matter to make her a trustee;" and he gives his reasons.

I agree with the Lord President that if that be, as I think, the old law of Scotland, we must follow it whether or not we may think it irreconcilable with modern ideas of what is right and reasonable. I would only remark that the Legislature had a most appropriate opportunity of altering the law in that respect when it did so as regards the guardianship of pupils. Why it did not do so in the case of minors I do not know, but I am of opinion that we cannot do so.

I therefore think that the question should be answered in the negative.

Lord Kinnear—I have found this question one of difficulty. I regret that in the result I have not been able to concur in the opinion which has been delivered by Lord Adam, and in which I understand your Lordship to agree. I can see no ground in reason, or in any principle of the law of Scotland as it is now established, why a married woman should be disqualified for acting as the curator of her minor child. It is now settled by a series of decisions, which cannot be called in question, that a married woman may be a trustee; that she may be a tutor of pupil children; that she may be a factor *loco tutoris* or a *curator bonis* of a lunatic; and that she is not only entitled to the exclusive beneficial enjoyment of her own separate estate, but that she has the uncontrolled management and administration of it as fully and freely as an unmarried woman. I am unable to see any reason for holding that a person who is capable of administering her own affairs, and capable also of administering the estate of a pupil child or of a lunatic should be incapable of administering the estate of a minor.

I agree that if there is a settled rule of positive law that a married woman cannot be a curator, we are bound to give effect to that rule whatever we may think of its reason. But I am not satisfied that there is sufficient authority for holding that such a rule has been established or now subsists. It is true that Mr Erskine says so, and the authority which was chiefly pressed upon us in argument was his statement of the law. I cannot regard his statement as authoritative, not only because it is, to say the least, very much shaken by the observations of Lord Meadowbank in the case of *Stoddart*, but because the doctrine is applicable in terms to tutory as well as curatory, and it is certain that in so far as the office of tutor is concerned it is not now the law of Scotland. He says—"All persons may be appointed either tutors or curators to minors who are fit for the management of an estate, and are not debarred by law and custom. Tutory being accounted by the Romans *officium virile* could not be exercised by women, excepting mothers in special cases." Then he goes on to say—"Married women are utterly disqualified for the office." That obviously means for the office of tutor as well as for the office of curator. "For if it be as Justinian reasons in a parallel case, a shameful confounding of names and things that the same person should be both tutor and minor, it must be equally absurd for one who is always subjected to the power or curatory of a husband to have another under her care and tuition. A father may name for tutors to his children either his own widow, or any other woman who is not married, and such nominee may lawfully exercise the office till she be *vestita viro*, and no longer, though the nomination should expressly provide the contrary." Then he goes on to point out that certain other persons are equally disqualified, including Papists and all persons who are even suspected of Popery.

Now, it appears to me that if the statement that married women are incapable of the office of curator is still the law of Scotland, it is the only statement in that passage of which that can be said, because everything else is dis-

placed by subsequent decision, and the doctrine which he lays down as the sole ground for the alleged disqualification is completely displaced. A married woman is not necessarily subject to the power or curatory of her husband. Mr Erskine's statement of the law therefore appears to me to rest upon a statement of principle which cannot be assented to. It is not, I think, a statement of the law of Scotland, but a statement of the Roman law, and the authority which would otherwise belong to it as the doctrine of Mr Erskine is, I think, as I have already said, shaken by what was said in the case of *Stoddart*.

If we are not to proceed solely upon Mr Erskine's authority, is there any other authority of greater weight? Lord Adam referred to a *dictum*, I think, of Lord Glenlee in the case of *Stoddart*, which is certainly entirely in accordance with his Lordship's own opinion; but, in the first place, Lord Glenlee's *dictum* was *obiter*, and, in the second place, it goes too far for the present purpose. For what his Lordship says is that he thinks that a married woman cannot be a tutor or curator, and there is no question that she may be a tutor. But then, further, his Lordship says that he conceives the case to be fixed by the decisions, and I must presume that the decisions to which he refers are those in the sixteenth century, which have been cited to us—the case of *Kerbechill* and the case of *Stuart*. I think the judgment in the case of *Stoddart* itself is inconsistent with Mr Erskine's doctrine, and it was manifestly so held by the Judges, notwithstanding the saving clauses introduced into their opinions by Lord Glenlee and Lord Robertson; because the question was whether a married woman's person was so sunk in marriage as to render her incapable of performing the functions of a trustee, and in support of that proposition the doctrine of Mr Erskine was cited. Lord Meadowbank says about that that he holds that she is not incapable. He says—"I see there is a doctrine of Justinian to that effect quoted by Mr Erskine which he seems to have adopted very loosely. I don't know any authority for it in the law of Scotland. There may have been some feeling of that kind in the infancy of the law with regard to tutors and guardians, but that does not seem to have been countenanced at any time by the enlightened principles of the law of modern Europe. It was never the law of Scotland that a woman in Scotland lost her status because she chose to marry. There is no sinking of the rational person as I understand by marriage." It is true that Lord Robertson indicates a contrary opinion. He says — "In general, I think that marriage does create such an incapacity, and on this ground, that by our law the person of the wife is completely sunk. All deeds done by her without her husband's consent are void and null, and personal obligations undertaken by her, even with his consent, are null." And for this last *dictum* the learned Judge might have cited, although he does not actually cite, the authority of Mr Erskine, who lays down the law in these terms. But then the question on which Lord Meadowbank and Lord Robertson were thus at variance in 1812 has now been finally settled by the judgment of this Court in *Biggart* v. *The City of Glasgow Bank* (Jan. 15, 1879, 6 R. 470), in which it was held, after a very elaborate discussion of all the authorities, that the obligations of a married woman in the administration of her separate estate were just as valid and binding as the obligations of anybody else. Erskine's doctrine to the contrary was pressed upon the Court in a very learned speech by the late Lord Fraser, who was then Dean of Faculty, and his authority was disregarded on the express ground that the discussion as to the capacities and incapacities of a married woman was obsolete law, and no longer the law of Scotland. I cannot therefore regard this passage as an authority.

Now, then, are the cases of *Kerbechill* and *Stuart* still law? because these are the only authorities left, unless we are to consider the case of the *Marchioness of Montrose* as an authority also. The late Lord President in the case of *Campbell* v. *Maquay* makes certain observations in regard to these decisions, which I am inclined to interpret somewhat differently from my learned brother Lord Adam. "One cannot help seeing that those judgments are founded, not on the principles of common law or equity, but entirely on the authority of the Roman law." And then he goes on to observe—"The earliest of the decisions to which we were referred, the case of *Kerbechill*, is particularly remarkable as illustrating that fact." It is quite true that when his Lordship proceeds to decide the case then before the Court, he prefers to rest his judgment upon what he thinks safer ground than that of the change of legal opinion since the case of *Kerbechill* and the case of *Stuart*, viz., on the Act of Parliament of 1886. He says that he thinks it would be a somewhat dangerous ground to hold that the decisions are to be disregarded merely because the spirit which inspired them is not reconcilable with the spirit of modern legal opinion. That certainly was a caution which was very natural for his Lordship to express in considering an argument such as had evidently been submitted to the Court in that case, and it was quite unnecessary for the Court to adopt any uncertain ground of judgment in the construction of an Act of Parliament since there was a perfectly clear provision by the Legislature in the Act of 1886 which is entirely inconsistent with those decisions. Whether we are to disregard them merely because they are inconsistent with the spirit of modern legal opinion or not, I do not consider, but I think the basis on which they rest was, in the first place, never the law of Scotland, but only the law of Rome, and, in the next place, that in so far as it appears to have been incorporated into the law of Scotland by those decisions, it has been displaced by subsequent decision, and by subsequent

legislation. It is quite true that the Guardianship of Infants Act of 1886 does not directly apply to the office of curator, but I do not think that any inference can be drawn from that circumstance unfavourable to the capacity of a married woman to act as a curator, because the direct purpose of that statute was not to remove incapacities, although as an incidental result of its provisions it was held that the incapacity of married women to act as tutors had been removed. Its purpose was to give the mother the absolute right to act as guardian in certain cases. Now, it may very well have been considered unnecessary or undesirable in giving the mother new rights as the guardian of pupil children to introduce any change into the law of Scotland with regard to curators and minors, which might have had the effect of depriving minors of the voice which they themselves had in the appointment of their own guardians. So that there is no reason in the limitation of that Act, considering what its purpose was, to the case of pupil children, that can possibly suggest an inference that the Legislature denied the capacity of married women to act as curator, while allowing them to act as tutors. But it is true that the statute does not directly provide for the case of curators, and therefore we cannot decide this case upon the ground on which *Campbell* v. *Maquay* was decided; but then that decision displaces entirely the ground upon which, according to all the authorities cited the incapacity of married women to act as curators is based, because it displaces the ground upon which the similar incapacity of married women to act as tutors is based. If there is no distinction with reference to its basis in law and reason between the alleged incapacity of a married woman in cases of tutory and in cases of curatory, then when the basis of the supposed disqualification in the one case is displaced the similar disqualification in the other case is left without support. There is nothing in any of the decisions to suggest that there is any distinction between the capacity of a married woman for the office of a tutor and her capacity for the office of a curator, and if the reason as regards tutory is entirely displaced in the way it has been, why should the rule as regards curatory remain?

But, on the other hand, if there is any distinction, then there is no authority against the capacity to act as curator, because all the cases cited were cases in which married women were held to be incapacitated for acting as tutors. Indeed, the first case of *Kerbechill*, which my learned brother Lord Adam considers to be still law, was a case in which the nearest male agnate was held entitled to remove a pupil child from the custody of the mother, because the mother had been married again, notwithstanding the fact that she had been appointed tutor by the father's testament. Now, that case had been directly disregarded long before the Guardianship of Infants Act was passed, in the case of *M'Callum* v. *M'Donald* (March 10, 1853, 15 D. 535) I think, where the Court refused to ordain a married woman to give up the custody of a child, and proceeded in considering the question, not upon any doctrine of incapacity at all, but precisely upon the same grounds on which we are now in the habit of proceeding in considering applications for the custody of children, viz., what is best for the benefit of the child, leaving it a question for judicial discretion only, which the Court had perfect power to decide according to what they thought was for the child's best interests, unrestricted by any arbitrary rule disqualifying the mother. I cannot therefore consider either that the case of *Kerbechill* or the case of *Stuart* is now the law. In regard to the case of the *Marchioness of Montrose*, I think that cannot be treated as an authority, because the question was not decided, or at all events if decided, the final judgment has not been reported. I therefore come to the conclusion that there is no sufficient reason why this lady should not be allowed to continue to act as curator, but of course that is contrary to the opinion which Lord Adam has delivered. And although I am unable to agree in the judgment which he has given, I am very far from considering that the question is free from difficulty.

LORD PRESIDENT—I entirely agree with Lord Adam. We answer the question in the negative.

LORD M'LAREN was absent.

The Court answered the question in the negative.

Counsel for the First Parties — Dundas—Abel. Agents—Tods, Murray, & Jamieson, W.S.

Counsel for the Second Party—W. Campbell—W. Brown. Agents—Morton, Smart, & Macdonald, W.S.

Tuesday, July 13.

SECOND DIVISION.

[Sheriff of Lanarkshire.

MOONEY *v.* WILLIAM DIXON, LIMITED.

Process — Jury Trial — Abandonment — Absolvitor in respect of Pursuer's Failure to Take Proper Steps to Cite Jury.

The pursuer in an action of damages for personal injury, whose agent had ceased to act for him, failed to pay the fee fund dues necessary, in terms of the Act of Sederunt of 18th December 1896, to enable a precept for citation of a jury to be transmitted to the Sheriff, and in consequence no jury was cited to try the cause on the day appointed for the trial. The Court, after intimation had been made to the pursuer, no reply having been received from him, *assoilzied* the defenders with expenses.