the evidence, the defender has failed to make out a marriage by habit and repute, which is his sole case."

Simpson, for South Leith, reclaimed.

Trayner (Monro with him) for reclaimer.

John Marshall, for respondent, was not called on.

At advising—

Lord President—I don't think I ever saw so weak an attempt to make out a marriage by cohabitation, habit and repute. The repute is of the most divided and ambiguous kind, and it is most natural that it should be so, because it arises from a cohabitation which plainly was not in the estimation of the man or woman a cohabitation as man and wife. They did not intend—I think that is the plain inference from the proof—to cohabit as man and wife, but only as man and woman, under a disguise for the purpose of misleading their landlady and neighbours. For the purpose of showing how divided the repute is—in itself a fatal objection to such a marriage—it is only necessary to attend to one or two points. In the first place, in 1866 the supposed wife makes that statement on being admitted to the poor-house of St Cuthberts, that she is a single woman and had been cohabiting with Whitelaw for three years. It was argued to us that if there has been cohabitation for three years sufficient to make a marriage, the denial of it will not unmake it, and that is true. But then, one would expect that for the three years there would be no doubt as to the facts. Now the first two witnesses called after the woman herself are Mrs Whitelaw and Jessie Whitelaw, the mother and sister of the alleged husband. The mother makes it clear that so early as 1863, that is just three years before the statement to St Cuthberts, she was satisfied that they were not married persons, and Jessie Whitelaw says she never from the beginning to the end thought them married. Really after that to talk of the constitution of marriage by cohabitation of these persons, and undivided repute, is out of the question, and it would be a waste of time to analyse the evidence farther. The Lord Ordinary has well expressed the result of the proof, and I entirely agree with him.

Lord Deas—It would be a great error to think that anything said as to the import of the proof in this case is to be taken as the entire substance of the proof, which extends to 50 pages, but I am perfectly satisfied that the result is as your Lordship has stated. There is nothing like a proof of habit and repute for any lengthened period. It can only be called a divided repute, because there are various persons to whom they thought it convenient to say they were man and wife, and who knew nothing to the contrary. But anything like undivided habit and repute is matter of which there is no shadow of evidence. If there had been good proof of that, I should not have been disposed to hold what passed with the registrar as conclusive, for under that Act these parties were obliged to get their child registered in some way, otherwise they would be subject to a penalty, and if it was not registered as legitimate they had scarcely any choice but to get it registered as illegitimate. Looking at the erratic life these persons led, no one can doubt that the most important witnesses are their own relations, and it is plain that neither on one side nor the other has there been brought a single witness who thought them married. They may have at one time thought they were, but it is plain that the mother and sister of the supposed husband, and the three brothers of the woman, thought they were not married, and plainly that was the opinion of the woman herself. To go over their evidence would merely be to weaken it. I see no ground for altering. It is unnecessary to consider what might be an important question,—whether the same amount of proof would be necessary for such a purpose as this, to prove a marriage incidentally, as to prove it in a regular declarator? But it is unnecessary to go into that, the proof in this case being so clear.

Lord Ardmillan—In this case the repute is divided, and it is not caused by that conjugal cohabitation which is required, but is caused, in the first place, by the false statements that there had been a marriage; and, in the second place, by statements made by persons who did not believe them when they made them, for they say they were made to get into houses and then they apologised for deceiving the landladies; and besides, the parties did not believe themselves married.

Lord Kinloch—I have come very clearly to the same opinion. Habit and repute is by our law good evidence of marriage; but it never can amount to proof where the repute is divided. But independently of this objection, I consider it clearly proved in this case, that the parties never were married by any of the modes of constituting marriage known to the law of Scotland, and never thought themselves married; and, where that is clear, no amount of apparent conjugal cohabitation, and no amount of repute will render them married persons.

Agent for Pursuer—E. Mill, S.S.C.

Agent for Defender—J. C. Irons, S.S.C.

Thursday, July 8.

MEEK'S TRUSTEE *v.* RUSSEL'S TRUSTEES.

Jury—Cancelling of Proof—Sheriff—Judicature Act, 6 Geo. IV, c. 120. Where, in an action of damages for breach of contract, the evidence led in the Sheriff-court was unsatisfactory, the Court, under the Judicature Act, section 40, cancelled the evidence and ordered issues with a view to jury trial.

Russel's trustees brought an action in the Sheriff-court of Linlithgowshire against James Meek, concluding for £5000 of damages for breach of a contract, under which they alleged Meek had agreed to purchase from them the whole of their stock of a certain mineral which they might put out of two specified pits, on certain conditions. After a proof the Sheriff-substitute (Home) decerned against the defender for £100 damages. The Sheriff (Monro) altered as to the sum of damages, and gave decree for the whole £5000. The trustee on Meek's sequestrated estate appealed.

Fraser and Scott for appellant.

Clark and Gloag for respondents.

The Court held that it was clear there had been a breach of contract; but the question of real importance in the case was anything but clear, there being no proper or satisfactory evidence on either side as to the amount of damages. In these circumstances the only course was to cancel the proof, and order an issue with the view of having the damages awarded by a jury in common form, Lord Deas observing, that the best illustration of the difficulty of assessing the damages was that the Sheriff-substitute had given £100 and the Sheriff £5000.

Agent for Appellant—T. Maclaren, S.S.C.

Agents for Respondent—Wilson, Burn, & Gloag, W.S.

Thursday, July 8.

BANNATINE'S TRUSTEES *v.* CUNNINGHAME.

Accounting— Trust-disponee — Burden of Legacies and Conditions. Held, on construction of documents and proof, that a party who had uplifted and paid away certain mineral rents was not bound to account therefor to a disponee of the property.

In 1834 the late Mrs Allason Cunninghame of Logan entered into an antenuptial marriage contract, by which she conveyed her estate of Logan to her husband in liferent and to their children in fee. On the other hand, by that deed Mr Cunninghame conveyed the estate of Enterkin to his wife in liferent and their children in fee. At this time no minerals had been wrought on the estate of Logan, but in 1845 ironstone was discovered, and a lease of it was granted to the Portland Iron Company. Mrs Cunninghame died in 1851 without leaving issue, and survived by her husband. At her death the working of the minerals was going on. She left a general disposition and settlement dated March 7, 1837, by which, *inter alia*, she conveyed her whole heritable and moveable property, including the estate of Logan, to the late Richard Bannatine, whom failing, to certain substitutes therein named. Mr Bannatine was appointed her executor. This deed contained a declaration that any memorandum signed by her, however informal, giving additional legacies or annuities, or otherwise expressive of her will, should be equally binding upon her disponees as if forming part of the disposition. In a holograph writing, dated 1849, Mrs Cunninghame left several legacies, and she stated—"I wish the income from the minerals to go to the Miss Logans, Flatfield, during their lives, and afterwards to be equally divided between the children of the late Major Baird, Falkland, and Mrs Craig, at present residing at Ayr." Upon Mrs Cunninghame's death, in 1851, the defender succeeded to the liferent of the estate of Logan under the marriage-contract. In 1857 Mr Bannatine, who had been in Australia at the time of Mrs Cunninghame's death, returned to this country, and he then intimated to the defender a claim to the mineral rents of the estate of Logan. The defender, in reply to this claim, stated that they fell to him under his liferent of the estate, or, at all events, that they fell to the Misses Logan under the holograph writing of 1849. He further stated that he had paid to the Misses Logan the mineral rents, which it was averred had amounted to upwards of £2000. Mr Bannatine died in 1857, and the present action was instituted by his trustees in order to compel the defender to account for the rents of the minerals.

The Lord Ordinary (BARCAPLE) found that the defender had not produced or founded upon any valid and effectual settlement or conveyance of the minerals, or of the income derived from them, by the deceased Mrs Allason Cunninghame in favour of the Misses Logan during their lives, and ordered the case to be put to the motion roll, in order to decide in what form the questions of fact should be ascertained.

The defender reclaimed.

CLARK and J. MARSHALL for reclaimer.

MILLAR, Q.C., and CRICHTON for respondent.

At advising—

LORD PRESIDENT—We have here two interlocutors under review, one of 29th May, and the other of 26th March 1869. The last mentioned is the more important; and, as regards one part of it, I find it impossible to agree with the Lord Ordinary. In so far as regards the first and second pleas, I have no objection to the way in which the Lord Ordinary has disposed of them, but he proceeds to find that the defender does not produce or found upon any valid and effectual settlement or conveyance of said minerals, or of the income from the same, by the deceased Mrs Allason Cunninghame in favour of the Miss Logans, Flatfield, during their lives, and that he has no good defence against this action in respect of such settlement or conveyance. I, on the contrary, am of opinion that the defender has produced and founded on an effectual settlement in favour of the Misses Logan by Mrs Allason Cunninghame of the income from these minerals, and that that affords, particularly in connection with the proof that the income was paid to them, a good defence against this action of accounting so far as concerns the income from the minerals. Mrs Cunninghame executed a disposition and settlement on 7th March 1837, by which she conveyed her whole heritable and moveable property to herself and her heirs, whom failing, to the deceased Richard Bannatine and his heirs, whom failing, to the defender, &c. Then comes a provision for payment of the testator's debts, and the burden of certain special legacies, and then, after the usual feudal clauses, there is this declaration, that any memorandum signed by her, however informal, giving additional legacies or annuities, or otherwise expressive of her will, should be equally binding on her said disponees as if forming part of the said deed. Taking this deed by itself, without going farther, it presents to my mind an instrument for construction that is not susceptible of any ambiguity. The disponee under this deed is burdened with certain special debts, legacies, and so on, sums of money; and cannot take the lands without foregoing that duty, and subjecting himself to that burden. But he is farther subjected to another condition, and that is, that he shall give effect to any other writing, however informal, which the granter may execute previous to her death, expressive of her will.

I know no difficulty about a deed of that kind. The disponee may take the subject or let it alone, but if he takes it he must do so under that burden. Now this lady, under this power of reservation, on 5th September makes a holograph writing in which she expresses herself thus: "Logan 15th September 1849.—I wish the income from the minerals to go to the Miss Logans, Flatfield, during their lives, and afterwards to be equally divided between the children of the late Major Baird, Falkland, and Mrs Craig, at present living in Ayr." But it is said she could not effectually give the income to them, because this is not a disposition. No doubt it is not. But it is a condition of the conveyance to Bannatine, and he cannot take the deed without conforming himself to that condition as much as to the other conditions. For nothing is clearer than that this condition is to be read as part of the testator's deed. Whether we look at this as a conveyance under a burden, or as incorporated into a conveyance in trust for the Logans, it comes to the same thing. On either ground there is no doubt that Bannatine and his representatives are bound by that codicil as effectually as if it was a conveyance to him in trust for the Misses Logan, so far as the mineral rents are concerned. I think therefore that the Lord Ordinary is wrong on that