duty paid for the water-power; and thirdly, a percentage of 6½ per cent. upon the cost of erecting the mill. I am of opinion that this mode of ascertaining the annual value is erroneous. It disregards entirely the plain rule laid down by the statute, viz., to ascertain what is the amount of rent that a tenant would give for such a mill with all the privileges that it possesses. There are various modes of ascertaining what rent would be given; but none of these has been adopted by the assessor or the Magistrates. That rent, too, would vary, in all probability, one year after another, according to the demand in the market for mills; and hence if there be no lease with a determinate rent therein, the assessor would be entitled to re-value the subjects each year, and the appellants would be entitled to demand such re-valuation, if that should prove for their interest. But instead of resorting to any of the modes open to them of ascertaining what rent a tenant would give for the whole subjects, the Magistrates, in the first place, take the feu-duty as an item in ascertaining the annual value, which is a novel proceeding in itself—feu-duty payable by the proprietor of a subject being a burden upon his property. Then, in the next place, to take the rent payable for the privilege of the water-power as if it were an heritable subject in the occupancy of the appellants and worth the sum paid for it, is to misapprehend altogether the nature of the privilege. It is in no way different from the case of steam being supplied by some person who upon the neighbouring land had erected a steam-engine, and had communicated the benefit of the steam which he made to adjoining factories, as is common enough in manufacturing towns in England. No doubt a mill having a perpetual right to obtain steam or water-power must be valued as having the advantage of so great a privilege. But the mode of doing so is not to take the sum paid for the privilege to the owner of the motive power. The third item valued is the buildings, and 6½ per cent. upon the cost of erection is taken. This is a very rough way of ascertaining what a tenant would give for a subject; but at the same time it often leads to fair results, because a reasonable percentage upon a man's expenditure on building may very well indicate what might be reasonably expected for the subject in the shape of rent. If a man builds a mill, and pays £15,000 in the erection, it is reasonable enough for him to expect a return of at least 6½ at per cent. But it must not be left out of view that when a percentage of this kind is taken, it includes everything connected with the mill. There are not, in addition to that percentage, added other annual payments made by the miller for privileges which enable him to work his mill with efficiency and economy. If these privileges are very exceptional and very valuable, that may be a reason for adopting a higher percentage than 6½. But I hold that this mode of ascertaining value ought not to be resorted to in reference to the subjects in question, and that there has been a miscarriage in the valuation altogether. As your Lordship, however, is of opinion that the Magistrates have arrived at a sound conclusion, their determination stands.

The Judges being divided in opinion, the determination of the Magistrates and Council stood.

Council for Appellants — Graham Murray. Agents—Smith & Mason, S.S.C.

Counsel for Respondent — Pearson — Shaw. Agents—Cumming & Duff, S.S.C.

COURT OF SESSION.

Wednesday, June 4.

FIRST DIVISION

[Lord Lee, Ordinary.

POOR ANDREW ANDERSON AND OTHERS *v.* MUIRHEAD.

Process—Curator ad litem—*Discharge*—*Judicial Factor.*

In an action at the instance of three minor children and their *curator ad litem*, who had been appointed when they applied for the benefit of the poor's roll, to recover damages for the death of the children's mother, a tender was made by the defender and accepted. The Lord Ordinary reported the case to the First Division, on a motion by the pursuers that the grandfather of the children should be authorised and appointed to receive and administer the money for behoof of the minor pursuers, and grant a discharge therefor. The Court *held* that a *curator bonis* must be appointed to the children in ordinary form.

This case was verbally reported to the First Division by Lord Lee, Ordinary, and the material facts are given in the opinion of the Lord President, *infra.*

The cases of *Murphy or Collins* v. *Eglinton Iron Company*, 19 S.L.R. 440, and *M'Avoy* v. *Young's Paraffin Light and Mineral Oil Company*, 19 S.L.R. 441, were quoted for the pursuers.

At advising

LORD PRESIDENT—As I understand, the pursuers of this action are the children of Mrs Margaret Anderson or Macaulay. The eldest is sixteen, the second fourteen, and the third twelve years of age, and they have sued Miss Emily Grosset Muirhead for damages in respect of the death of their mother, and have had a tender made to them by the defender of £120. This tender they have accepted. Thereupon the Lord Ordinary on 27th May pronounced this interlocutor—"The Lord Ordinary in respect of the minute of tender for the defender, No. 9 of process, and of the statement on the part of the pursuers that they now accept the same, discharges the order for adjustment of issues: Finds the pursuers entitled to the sum of £120 as tendered, and expenses of process as the same shall be taxed, upon delivering to the defender of a sufficient discharge: Allows the pursuer to lodge an account of his expenses, and remits to the Auditor to tax the same and report, and continues the cause." Now, the question comes to be, how the pursuers' claim is to be discharged? That is the form the question must take. There was a *curator ad litem* appointed to these children, when they applied for the benefit of the poor's roll, and before the case came before the

Lord Ordinary; and this *curator* is, of course, still a party to the cause. I understand the proposal made to the Lord Ordinary was that the grandfather of these children should be appointed in this process as factor or curator to them, and that authority should be given to him to discharge their claim. We were referred to two cases occurring in the Second Division of the Court, with the particulars of which we are not acquainted, but where something of this kind is said to have been done. But the practice in this Division has been opposite. I find a case of *Pratt* v. *Knox* reported in 17 D. 1006 (28th June 1855), which is to the following effect. [*His Lordship read the report of the case.*] Then there was another case before us which occurred in 1881—*Anderson* v. *Kidd and Others*, March 18, 1881, not reported. It has not been reported, but I have my papers with a note upon them of all that took place. There had been in that case a verdict for the pursuers, who were a certain mother and her children, and then a motion was made for a new trial. Before disposing of that motion the Court desired to understand whether the mother would undertake to hold the whole amount awarded by the jury in trust for herself and her children. She declined to do so, or, at all events, some difficulty arose in following that course, and accordingly, on 16th February 1881, the Court continued the cause until a factor *loco tutoris* should be appointed to the children. On 17th March, a factor having been appointed in common form, by application to the Court, he was sisted a party to the cause, and then he and the mother entered into a joint-minute which specified the proportions in which the sum awarded by the jury should be divided amongst the pursuers. We then refused the motion for a rule, applied the verdict, and decerned. The present case appears to me to be of precisely the same nature as those I have referred to. I think we cannot depart from our established practice, and that we should instruct the Lord Ordinary that nothing further can be done in the cause until a curator, or a factor of some kind, has been appointed to these children.

Lord Mure and Lord Adam concurred.

Counsel for Pursuers — Armour. Agent — J. A. Trevelyan Sturrock, S.S.C.

Counsel for Defender — Jameson. Agents— Webster, Will, & Ritchie, S.S.C.

Wednesday, June 4.

SECOND DIVISION.

[Lord Kinnear, Ordinary.

A. B. *v.* C. B.

Husband and Wife—Constitution of Marriage—Nullity of Marriage—Impotency—Personal Bar.

A man of forty-seven went through a marriage ceremony with a woman of twenty. They lived together for twenty months, as a rule occupying the same bed, and then separated, holding no further communication with each other. More than three years after the separation the woman bore a child, of which the man was admittedly not the father, and he thereupon raised an action of divorce against her on the ground of adultery. She defended that action, and herself raised an action for decree of nullity of marriage against her pretended husband on the ground that he was impotent. It was proved that there was no malformation or sign of ill-health in him; that no connection had taken place between them, although he had attempted it frequently for two months after the marriage ceremony. For the remainder of the time they lived together he made no attempt, owing, as he alleged, to her coldness and want of affection. She admitted that after they had lived together for a few months she had begun to dislike him. About a month after they separated the woman consulted a law-agent, who made her aware of her rights. In the action for decree of nullity of the marriage the Lord Ordinary (Kinnear), without deciding whether the pursuer was barred from maintaining the action, *held*, upon the proof, that impotency had not been established, and *assoilzied* the defender. The Court (*rev.* the Lord Ordinary's judgment—*diss.* Lord Rutherfurd Clark) gave decree in terms of the conclusions of the summons.

The parties to the action to be reported were married at Bombay on 29th November 1877, the man being then forty-seven years of age, and the woman twenty. They went on a honeymoon for ten days or a fortnight, and then returned to Bombay, where they remained until they left for Kurrachee about the end of February. Till within two or three days of going to Kurrachee they slept together in the same bed. They stayed at Kurrachee for about a fortnight, occupying the same bed, excepting the night of their arrival, on which occasion she refused to sleep with him. They then returned to Bombay, where they remained till the end of December, when they came to Scotland, where they lived together till June 1879. During all that time they still occupied the same room and the same bed. In June 1879 they separated. The man then went to London to seek for new employment. On his return they did not live together. Before he left there had been some variance between them, he complaining that she showed no respect for him, and she saying she felt none, and declining to change her manner towards him.

In October 1882 the woman bore a child. She registered its birth, and in the column of the register where the names, surnames, and rank of the father and mother fall to be entered she made this entry—"A. B." (her own name), "wife of C. B.," &c. &c. (the name and designation of the man), "who she declares is not the father of the child, and further, that she has had no personal communication with him since they ceased to reside together three years ago." This statement was true.

On 23d March 1883 her pretended husband served a summons of divorce, on the ground of adultery, upon her, and on 13th April she raised an action for decree of declarator of nullity of marriage against her pretended husband. The conclusions of the action were that "the Lords of our Council and Session ought and should find and declare that the defender was, at the time when the pretended marriage between him and