ally "the whole property, heritable and moveable, now belonging or resting-owing to her or that shall in any way pertain and be owing to her during the subsistence of the marriage, including therein the said means, estate and provisions made or to be made in her favour by her mother Mrs Ellen Hamilton Montgomerie." The purposes of the marriage-contract trust were to pay the trust income to the spouses jointly during the subsistence of the marriage, and on the death of the survivor of the spouses to pay to the children of the marriage, if there were any, and in the event of the death of the wife without issue surviving to pay and convey the capital of her property to her husband in liferent and to his children by a first marriage in fee. The children of her husband's first marriage are the third parties to this case.

The power of disposal given by Mrs Hamilton or Montgomerie was in these terms—after directing that shares of her residue should be enjoyed by her daughters in liferent and their children, if any, in fee, *quoad* their respective shares, then it was directed that in the event of the death of her daughters without issue, their shares should be disposed of "in such way and manner as my daughters respectively shall direct by any *mortis causa* deed or deeds to be executed by them respectively, to take effect at their deaths."

It seems to me that the contention of the third parties fails in several ways. The cases have gone far enough in holding that where a testator in a general settlement conveys all his property, that carries property that never was his but over which he had only a power of disposal. It has been so decided, and the ground of the decision must be that a testament is ambulatory, and is the last expression of the testator's desire that so far as in him lies his testament should carry everything that it possibly could carry. It seems to me an extension, for which there is no authority whatever, to say that when *acquirenda* are conveyed in a marriage contract, that is a good exercise of a power of appointment which did not exist at the date of the contract. Even if the third parties' contention did not fail in that, when one comes to the marriage contract I find nothing in it that makes the provision in favour of the children of a former marriage contractual. I think that the marriage-contract provisions so far as they applied to these children, were not contractual, and that they were revoked by Mrs Alexander's subsequent settlement. On both of these grounds I am of opinion that the first question should be answered in the negative and the second question in the affirmative.

LORD JOHNSTON—I agree with your Lordship and have nothing to add, except that there is nothing in Mrs Alexander's marriage contract to indicate that she intended to exercise this power to test, even if the terms of her mother's settlement, which had not yet taken effect—for she survived her daughter's marriage—had been known to her. For the disposal of Mrs Alexander's estate proceeds on the footing that her trustees could be substituted and surrogated in her place, and could apply what they take under her conveyance for the purposes of the marriage contract. The terms of Mrs Montgomerie's settlement precluded the former, and, if they did not, would preclude the latter, except to a limited extent.

LORD SKERRINGTON—I concur.

LORD KINNEAR and LORD MACKENZIE were sitting in the Extra Division.

The Court answered the first question of law in the negative, and the second in the affirmative.

Counsel for the First Parties—Dunbar. Agents—J. & D. Smith Clark, W.S.

Counsel for the Second and Third Parties — Constable, K.C. — Hamilton. Agents—Mackenzie & Wyllie, W.S.

Counsel for the Fourth and Fifth Parties —Chree—R. C. Henderson. Agents—W. & J. Burness, W.S.

Thursday, May 25.

SECOND DIVISION.

(SINGLE BILLS.)

BONNAR *v.* BONNAR.

Expenses—Husband and Wife—Action of Separation and Aliment at Wife's Instance—Reclaiming Note by Her—Interim Aliment and Expenses.

A wife raised an action of separation and aliment against her husband. The Lord Ordinary, after a proof, assoilzied the defender. The pursuer, having reclaimed, presented a note to the Inner House craving interim aliment and an award of expenses.

The Court *refused* her application.

Mrs Agnes Swift or Bonnar, 75 Main Street, Neilston, Renfrewshire, wife of Neil Bonnar, clerk, residing at 28 Langside Road, Glasgow, raised an action of separation and aliment in the Court of Session against her husband. On 3rd March 1911 the Lord Ordinary (ORMIDALE), after a proof, assoilzied the defender from the conclusions of the summons, but found him liable in the expenses of the action. On 6th April 1911 the pursuer reclaimed against the Lord Ordinary's interlocutor. She thereafter presented a note to the Court craving, *inter alia*, an interim award of aliment at the rate of 10s. per week and a sum of £20 towards her expenses.

When the case was called in the Single Bills on 25th May 1911 counsel for the defender (respondent) objected to any award being granted, and argued—After proof the Lord Ordinary had assoilzied the defender. The pursuer could not, therefore, be said to have a *prima facie* case. .

She must, however, show a *prima facie* case before any award would be granted—Fraser, Husband and Wife (2nd ed.), vol. i, 851. There was no case in which an award had been granted in circumstances like the present. Counsel referred to *Petrie* v. *Petrie*, 1910 S.C. 136, 47 S.L.R. 151, and *Jaffray* v. *Jaffray*, 1909 S.C. 577, 46 S.L.R. 458.

Argued for pursuer (reclaimer)—A wife was clearly entitled to aliment when the question whether she was entitled to live apart from her husband was *in pendente*. If the pursuer was refused aliment in the present circumstances it meant that she must rest content with the judgment of the Lord Ordinary and return to her husband's house. Opportunity of reclaiming would be denied her. It was the practice to make such awards where the wife was defender and reclaimer—*Ritchie* v. *Ritchie*, March 11, 1874, 1 R. 826, 11 S.L.R. 569; *Montgomery* v. *Montgomery*, October 22, 1880, 8 R. 26, 18 S.L.R. 6. There was no difference in principle where the wife was pursuer.

LORD JUSTICE-CLERK—This is an action of separation and aliment on the ground of cruelty at the instance of a wife. Having been unsuccessful in the Outer House she has reclaimed, and she now makes an application to the Court for an award of interim aliment and expenses to enable her to prosecute her appeal. The circumstances are not uncommon, and if it were the practice of the Court to grant such applications one would expect to find the practice known and well settled. No case, however, has been quoted to us in which an application in similar circumstances has been granted. Without saying that a case might not arise in which the Court in the exercise of its discretion would make such an award, I am of opinion that there are no grounds for granting the present application. The reclaimer comes into Court with a case which has been investigated by a proof, with the result that so far as the Outer House is concerned she has been held to have no grounds entitling her to succeed. In such circumstances I see no reason for exercising our discretion to the effect of granting the reclaimer's application.

LORD SALVESEN — I am of the same opinion. Cases of this sort have frequently occurred in the past, and yet the pursuer's counsel was unable to point to a single one in which such a motion as he makes has ever been granted. I think there is nothing exceptional in the circumstances here as presented to us by counsel, and therefore we must adhere to what I have always understood to be the established practice.

LORD CULLEN—I concur in thinking that this is not a case in which an interim award of aliment or expenses should be granted.

LORD ARDWALL was absent, and LORD DUNDAS was sitting in the Extra Division.

The Court refused the prayer of the note.

Counsel for Pursuer (Reclaimer)—King Murray. Agent—James M'William, S.S.C.

Counsel for Defender (Respondent)—J. Stevenson. Agent—Campbell Faill, S.S.C.

Thursday, May 25.

EXTRA DIVISION.

[Sheriff Court at Paisley.

M'DAID *v.* STEEL.

Master and Servant—Workmen's Compensation Act 1906 (6 *Edw. VII, c.* 58), *sec.* 1 (1)—"*Arising out of and in the Course of the Employment*"—*Disobedience to Orders by Using Hoist.*

A message boy who was employed in delivering fish at a kitchen situated on the third floor of an infirmary was injured while making his way from the ground floor to the third floor by means of a hoist which he had entered and caused to ascend. There was a notice at the side of the hoist to the effect that it was only to be used by servants of the institution, and worked only by those specially authorised by the directors, but it was not proved that the boy had read the notice, or had his attention directed to it, though it was proved that he had been cautioned against using the hoist. *Held* that the accident did not arise out of and in the course of his employment.

The Workmen's Compensation Act 1906 (6 Edw. VII, cap. 58), section 1 (1), enacts—"If in any employment personal injury by accident arising out of and in the course of the employment is caused to a workman, his employer shall . . . be liable to pay compensation . . ."

John M'Daid, message boy, Paisley, with the consent and concurrence of his father, Thomas M'Daid, as his curator and administrator-in-law, claimed compensation under the Workmen's Compensation Act 1906 from his employer, James Steel, fishmonger, Paisley, and the matter was referred to the arbitration of the Sheriff-Substitute at Paisley (LYELL), who assoilzied the defender, and at the request of the appellant stated a case for appeal.

The following *facts* were proved—"(1) On 5th October 1910, and for some three or four months prior to that date, the appellant was a message boy in the employment of the respondent, who is a fishmonger in Paisley. (2) During that period the appellant's duty was to carry from the respondent's shop and deliver fish, *inter alia*, at the Royal Alexandra Infirmary, Paisley. (3) That the kitchen of this infirmary is situated on the third storey, and is reached by a staircase and also by a slow moving hydraulic hoist. (4) That on the said 5th October 1910 the appellant was, in the course of his employment, delivering fish at the infirmary. (5) That he carried the