

dismissed. He also urged as a separate objection to the third issue that a person, though he did give false information to a Procurator-Fiscal, was not liable for damages in respect of what was done after the Fiscal had opportunity to inform himself on the subject. The pursuer replied that this case was different from Montgomery's, because the assault could not be pretended to have been committed in execution of the statute, and what followed was all bound up with it. What the defender did was to assault the pursuer, and having done so, to go to the police and the Fiscal, and pretend that the pursuer had assaulted him.

The Court unanimously disallowed the second and third issues, holding that in regard to them this case was not distinguishable from that of Montgomery. If it was the fact that the information to the police was given as represented by the pursuer, the whole could be proved at the trial under the first issue as part of the *res gestæ*.

MACKENZIE (DIXON'S TRUSTEE) v. GOLDIE.

Expenses. A defender who unsuccessfully opposed the allowance of issues on the ground that the action was irrelevant, found liable in expenses from the date of closing the record.

Counsel for Pursuer—Mr Patton and Mr W. M. Thomson. Agents—Messrs Melville & Lindesay, W.S.

Counsel for Defender—Mr Pattison and Mr Hall. Agent—Mr James Sommerville, S.S.C.

This case was reported by the Lord Ordinary upon Issues. The Court after a long discussion allowed the proposed issues, and in respect the objections stated by the defender were not directed to the form of the issues, but to the relevancy of the pursuer's averments, the defender was found liable to the pursuer in expenses since the date of closing the record.

MP.—BRITISH LINEN COMPANY v. MACKENZIE AND OTHERS.

Donation—Deposit Receipt—Proof. A person averring verbal donation of a deposit receipt allowed (alt. Lord Kinloch) a proof *pro ut de jure* before answer.

Counsel for Reclaimer—Mr Lorimer and Mr Hall. Agent—Mr John Neilson, W.S.

Counsel for Competing Claimants—Mr Watson and Mr MacEwan. Agents—Messrs Grant & Wallace, W.S., and Mr George Cotton, S.S.C.

This was a competition for a sum of £100 contained in a deposit receipt in favour of Peter Ross, residing in College Wynd, Edinburgh, who died intestate on 30th December 1863. The deposit receipt was dated 16th March 1863. The amount was claimed by Mrs Margaret Bertram or Muir, residing in Sauchiehall Street, Glasgow, on the ground that Peter Ross made a donation of the receipt to her on 28th December 1863. She averred that Ross had known her in her childhood, and interested himself in her education; and on 26th December she proceeded to Edinburgh at his anxious request and took up her residence in his house in order to attend to him in his last illness. Two days afterwards he gave her this deposit receipt, blank endorsed, declaring his intention that it should be an instant donation to her. In two days more he died.

LORD KINLOCH repelled Mrs Muir's claim, holding that donation could not be proved by parole evidence. The mere possession of a deposit receipt may, his Lordship observed, "evidence nothing but an unceremonious investigation of the repositories of the deceased." The only other evidence which she offered was that of herself and of parties who had heard the deceased anterior to the donation express his intention to make it, and, after it was made, state that he had done so. This evidence, the Lord Ordinary thought was incompetent. Mrs Muir reclaimed, and contended that although donation was

not to be presumed, there was no absolute rule in the law of Scotland that parole evidence of it was incompetent. She founded on the case of the National Bank v. Bryce, where the Court recently allowed a proof before answer in regard to an alleged donation of a bank cheque.

After hearing Mr Hall, the Court asked the other side if they objected to a proof before answer. This was consented to, and the Court recalled the Lord Ordinary's interlocutor and allowed a proof.

SECOND DIVISION.

SMITH v. SMITH.

Husband and Wife—Title to Sue—Marriage Contract Provision—Desertion. (1) A wife has a title to sue her husband for payment of a provision to her in her marriage contract, although trustees were nominated in the contract at whose instance action and execution should pass. (2) A wife who has deserted her husband may sue him for payment of such provision, although she could not sue him for alimony, that being an equitable claim.

Counsel for the Pursuer—Mr Patton and Mr Asher. Agents—Messrs Paterson & Romanes, W.S.

Counsel for the Defender—Mr Fraser and Mr Scott. Agents—Messrs Witherspoon & Mack, S.S.C.

This is an action at the instance of Mrs Isabella Bain or Smith, wife of Mr Adam Smith, writer in Falkirk, and is directed against her husband. The conclusions of the action are for two half-yearly instalments of an annuity of £60, which the pursuer says is due to her under an antenuptial contract of marriage entered into between them on the 11th of August 1847, by which the defender settled that yearly sum on the pursuer; and further, that the defender should be decreed and ordained to settle and secure at the sight of the Court, in terms of the contract of marriage, the said free yearly annuity of £60 to and in favour of the pursuer, the same to be secured so as to be paid to her during the subsistence of her marriage with the defender, exclusive of the *jus mariti* of the defender, courtesy of Scotland, or other title, and also exclusive of liabilities for his acts and deeds and the diligence of his creditors, and thereafter during her widowhood, if she shall survive her husband. There is an alternative conclusion that the defender should be ordered to consign £2000, in order that the same be invested at sight of the Court for payment of the annuity. There is an additional conclusion that the defender should pay the pursuer the sum of £1248, 16s. 5d., being the one-fourth part or share of her father's estate, to which the pursuer is entitled, exclusive of the *jus mariti* of her husband, or that he is bound to make it forthcoming that she may invest it.

After living* for some time together the wife left the society of her husband, and they are now living separate. The defender, in respect of such desertion, pleads that he is not bound to pay the annuity. In the marriage contract there was a clause nominating trustees, at whose instance action and execution should pass, and upon this clause the defender pleads that the pursuer had no title to sue. To this the pursuer answered that of the persons named as trustees four are dead, one, if alive, is out of the country, and the others declined to act. The Lord Ordinary (Kinloch) repelled the objection to the pursuer's title to sue, holding that, besides the pursuer's answer, the nomination of trustees in a marriage contract, however convenient in many supposable circumstances, does not deprive the wife of her personal right to sue (with a curator *ad litem*) for fulfilment of her marriage contract. On the merits his Lordship found that the defender was bound to pay the annuity—the marriage contract containing no conditions warranting a refusal. Whatever was the motive of the parties for entering into such an

arrangement it was not an illegal one, and must be enforced as made. As to the last conclusion, the Lord Ordinary has found the defender bound to set aside and invest such sum as shall appear to have been received by him out of the pursuer's one-fourth share of her father's estate, that the pursuer may receive the liferent thereof, in respect of a provision to that effect in the marriage contract. Against that claim the defender pleaded compensation, in respect he had expended large sums on her account. To-day the case was argued and advised.

The LORD JUSTICE-CLERK, in giving judgment, said the question was a new one and important. There was no doubt that the desertion of the wife was an established fact in the case, because, except where there is fault on the part of the husband, a wife living separate from him without a decree of separation is in a state of desertion. In such a case she could not pursue an equitable claim, such as one for aliment. But her claim here was one in law under a deed of contract, and it was no answer to that to say that she had violated her conjugal duties. The husband's objection is that the wife has violated her marriage vows, but not the antenuptial contract, which determines her right to the annuity. The remedy which the husband had was an action of adherence, not to refuse to implement his obligations under the special contract. As to the sum of £1248, the wife's share in her father's estate, it was quite plain that the husband was bound to invest this so as to give precise effect to the terms of the marriage contract.

The other Judges concurred.

An interlocutor was pronounced ordaining the husband to put in a minute stating how he proposed to settle the annuity, and appointing him to consign the £1248 in the Bank of Scotland, subject to the orders of the Court.

Friday, Jan. 12.

FIRST DIVISION.

PETITION—MUIRHEAD.

Process—Tutor—Power to Grant Leases. An application by a tutor to a pupil for authority to grant leases of extraordinary duration, ordered to be intimated to the next heir of entail resident in this country.

Counsel for Petitioner—Mr Broun. Agent—Mr Sprot, W.S.

The petitioner, Robert Dalrymple Steuart Grossett Muirhead, as tutor and administrator-at-law of Miss Grossett Muirhead, heiress of entail in possession of the estate of Bredisholm, applied for authority to grant certain leases the period of endurance of which extends beyond the time when his tutory will cease. The petition prayed for intimation on the walls and in the minute-book only; and it was stated that this course had been followed in the case of Morison, 19th July 1861 (23 D. 1313), but the Court in this case appointed intimation to be made also to the next heir of entail resident in this country.

DUNLOP v. SCOTTISH NORTH-EASTERN RAILWAY COMPANY.

Proof—Diligence. Motion for a diligence to recover a return made of a party's income to the Income Tax Commissioners *refused*.

Counsel for Pursuer—Mr Mackenzie. Agents—Messrs G. & H. Cairns, W.S.

Counsel for Defenders—Mr Watson. Agents—Messrs Morton, Whitehead, & Greig, W.S.

In this action of damages for personal injuries the defenders moved for a diligence to recover, *inter alia*, the return which the pursuer had made of his income to the Income Tax Commissioners, for the purpose of proving that it was there stated at a lower sum than that at which he now represents it. The motion was refused.

ALEXANDER v. ALEXANDERS.

Reduction—Fraudulent Misrepresentation and Concealment—Essential Error. (1) Issues for the purpose of trying a question of fraudulent imputation of agreements which allowed. (2) Issue whether they were made under essential error disallowed.

Counsel for Pursuer—The Solicitor-General and Mr Gifford. Agent—Mr W. S. Stuart, S.S.C.

Counsel for Defenders—Mr Clark and Mr Shand. Agents—Messrs Melville & Lindesay, W.S.

The pursuer of this action was the eldest son and the defenders were the daughter and younger son of the deceased Robert Alexander, portioner and boat-builder, residing at Swinton, near Baillieston, in Lanarkshire. The pursuer seeks to set aside three written agreements made by him with his brother and sister in regard to the succession of their father, who died intestate. What he complains of is that by fraudulent misrepresentation or concealment, and in ignorance of the nature of his father's property and his right and interest therein, he was made to abandon valuable rights as heir-at-law, and to consent to an equal distribution of the whole property, heritable and moveable, subject to certain subsidiary arrangements. The averments of fraud and essential error were denied.

In order to try the questions thus raised the pursuer proposed three issues, putting the question in regard to each of the three agreements, whether it was fraudulently imputed from him by the defenders, or one or other of them; and also a fourth issue, putting the question in regard to all the agreements, whether they were signed by him under essential error as to the nature and extent of the estate of his father and of his legal rights therein.

The defenders objected to the issues on fraud that they should be laid not on fraud but on fraudulent misrepresentation or concealment, and should state (though generally) to what these were made applicable. They also objected to the fourth issue, on the ground that there was no relevant averment of error as a separate ground of action from the fraudulent misrepresentation and concealment.

The Court to-day granted an issue in regard to each agreement, whether it was imputed from the pursuer by fraudulent misrepresentation or fraudulent concealment on the part of the defenders, or one or other of them, in regard to the nature and extent of his father's estate and of his legal rights therein. The issue founded on essential error was disallowed, on the understanding that evidence of error on the part of the pursuer would be admissible as evidence of the issues, which were allowed.

PETITION—THE DUKE OF ATHOLE.

Entail—Entail Amendment Act. Question under section 28 of Entail Amendment Act as to what was the true date of an entail proposed to be set aside.

Counsel for Petitioner—Mr Patton. Agents—Messrs Tods, Murray, & Jamieson, W.S.

This petition was presented by his Grace the Duke of Athole for authority to acquire the Athole trust estates in fee simple, in terms of the Acts 11 and 12 Vict., c. 36, and 16 and 17 Vict., c. 94. The petition was presented with concurrence of the three next heirs of entail. Lord Mure having remitted the petition to Mr Kermack, W.S., he suggested a difficulty in regard to the competency of the application, arising out of the fact that the Entail Amendment Act, under which it was presented, had reference solely to tailzies dated prior to 1st August 1848, and it was doubtful whether this tailzie belonged to that class. It appeared that in 1829 John, fourth Duke of Athole, executed an entail of his fee-simple estates, and on the same day executed a trust conveyance of these estates, with a provision in the entail that it should not take effect until the trustees should be able out of the rents of the estates to pay off the debts