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 Grosett Muirhead, as tutor and administrator-at-law of Miss Grosett 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 impetration 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 impetrated 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 impetrated 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

of the truster as the same should be ascertained. The trustees found that the liquidation of these debts in the manner intended was a hopeless and impracticable operation, and they therefore obtained in 1853 the authority of Parliament to their executing an entail of the estates in favour of the last Duke under burden of the debts so far as subsisting. The question, therefore, was whether the true date of this entail was 1830, when the Duke died and his trust deed came into operation, or 1853, when the Act of Parliament was passed. The Entail Amendment Act provides (sec. 28) "that for the purposes of this Act the date at which the Act of Parliament, deed, or writing placing such money or other property under trust, or directing such land to be entailed, first came into operation, shall be held to be the date at which the land should have been entailed in terms of the trust, and shall also be held to be the date of any entail to be made hereafter, in execution of the trust, whatever be the actual date of such entail."

Lord Mure having reported the point to the Court, Mr Patton was heard thereon for the petitioner. To-day the Court unanimously held that although the point presented at first sight a good deal of complexity, and was most properly brought under the notice of the Court by Mr Kermack, the true date of the entail in the sense of the statute was 1830, when the Duke's trust deed came into operation by his death. The Act of Parliament was really obtained for the purpose of giving effect to the trust deed of 1829, although in consequence of circumstances it was afterwards thought advisable that the trust deed should not be fully carried out. The Act of Parliament only limited the effect of the trust deed, and authorised its being carried out in a limited form.

STEWART AND OTHERS *v.* THE GREENOCK HARBOUR TRUSTEES, *et e contra.*

Property—Bounding Title—Possession. Terms of a feu-contract which held to confer a bounding title and to prevent the feuar from acquiring by prescriptive possession any ground beyond the specified boundaries.

Counsel for Trustees—The Solicitor-General and Mr Shand. Agent—Mr John Ross, S.S.C.

Counsel for Stewarts—Mr Gifford and Mr Macdonald. Agent—Mr Thomas Ranken, S.S.C.

Miss Jane Stewart, residing at Liberton Manse, and her sisters raised an action against the Greenock Harbour Trustees, concluding to have them removed from a piece of ground on the east side of Virginia Street, Greenock, which they alleged was a part of a feu belonging to them. The Harbour Trustees thereafter raised an action to have it declared that the said piece of ground belonged to them. The two actions were afterwards conjoined.

The feu belonging to the Stewarts was acquired by their ancestor, Roger Stewart, in 1789, from John Shaw Stewart, of Greenock, and was described as "that piece shoar or sands wholly within the high-water mark, lying upon the north side of the high road leading from Crawford's Dyke to the town of Greenock, and upon the east side of the slip or entry of 44 feet wide, leading into the sea to the low-water mark." Then followed a particular description both of the boundaries and measurements of the feu. The stipulated feu-duty was exactly proportioned to the measurement stated. The precept of sasine directed sasine to be given of ground of the "particular mensurations" and "bounded" as before specified. The contract contained this clause—"with power to the said Roger Stewart and his foresaids to gain the said piece of shoar off the sea by stone walls or bulwarks." There was also a declaration that the superior should not have it in his power to feu that part of the shore immediately below and to the northward of the feu without first making an offer of the same to the said Roger Stewart. The high road referred to in the description is now the street called Rue End Street. The site of the slip or entry also therein referred to is now occupied by Virginia Street. The sea-shore, which was the boundary of the feu on the north and east sides, was vacant in 1789. It was averred by the Harbour Trustees that the superior contemplated feuing this ground to the north, as appeared from the clause of pre-emption above-mentioned.

By an Act of Parliament passed in 1801 the powers of the Harbour Trustees were enlarged, and they were authorised to build new harbours, piers, &c., on the shore ground within certain limits, which limits comprehended the shore to the north of Roger Stewart's feu. The trustees averred that in anticipation of this Act they had arranged with the superior for the purchase of a large tract of shore ground, consisting of upwards of five acres, and that although no formal title was granted, the agreement was concluded and possession given at Whitsunday 1801. A feu contract was executed in 1811, by which the trustees acquired "all and whole the East Harbour of Greenock, as now erecting," bounded, *inter alia*, by the river Clyde on the north and by the properties belonging, *inter alios*, to the heirs of the late Roger Stewart on the south. It was averred that the trustees in this way acquired right to the whole shore ground immediately to the north of the ground feued to Roger Stewart, and that the ground in question had been possessed by them for more than forty years. The ground had now become valuable, and hence this litigation.

On the other hand it was averred by the Stewarts that when their ancestor feued his ground, he had, in virtue of the power in his charter, embanked the ground to the north of his feu, and so gained it off the sea. For that purpose he constructed at the north end of his ground a stone bulwark which was wholly outside of the measurements specified in his contract. It was the solum on which this bulwark was erected which was now in dispute. The shore ground which the trustees had been authorised to embank was then entirely within the sea at high water, and had not been gained from the sea. The conveyance of 1811 to the trustees did not include any part of the ground within Mr Stewart's bulwark. The disputed ground had not been possessed by the trustees, but had all along been possessed by them and their tenants.

The trustees pleaded that the ground was expressly included in their charter and not in Mr Stewart's; that they had possessed it for forty years, while the Stewarts had not; and that the Stewarts had no title under which by any length of possession they could acquire right to the ground. The Stewarts pleaded that the ground in dispute was beyond the trustees' property, which they held under a bounding title, and that therefore they were entitled to be assoilzied from the declarator.

Lord Kinloch, on 9th July 1863, found that the Stewarts had right to no ground other than is contained in their charter, according to the measurement therein specified, and no right to any ground beyond said measurement in name of embankment or in respect of alleged possession. He held that Mr Stewart's charter was a bounding title, and that they had no title to any ground beyond the bounding lines. He did not think that the power given to Mr Stewart to erect a bulwark beyond his boundary in order to gain the shore ground from the sea was meant to give him any property in the ground on which the bulwark was erected.

The Stewarts reclaimed against this interlocutor, and the Court, after allowing a proof and hearing parties, adhered to Lord Kinloch's interlocutor, with expenses, subject to modification.

Lord ARDMILLAN, who delivered the judgment of the Court, said—We have here two conjoined processes—1st, an action of removing at the instance of the Stewarts; and 2d, an action of declarator at the instance of the Greenock Harbour Trustees. The true question appears to me to turn upon the state of the titles. The argument of Mr Macdonald on the proof was very ingenious; and if on the titles there was a case for prescriptive possession, I should