M'Kie for pursuer.

Fraser and Muir in answer.

The defender reclaimed against the interlocutor.

The cause was heard in December last, when the Court refused to hold the action incompetent, but, in respect of the offer made by the defender, superseded farther consideration of the cause to allow the pursuer to test the sincerity of the defender's offer by returning to his house. To-day the defender again moved for *absolvitor*, on the ground that the parties were now living together as husband and wife; but this motion being opposed by the pursuer, and it being stated to the Court that though the pursuer had returned to the defender's house he still continued his cruel treatment, they refused to grant *absolvitor*, and superseded further consideration of the cause.

Agents for Pursuer—Wormald & Anderson, W.S.
Agent for Defender—William Officer, S.S.C.

Tuesday, March 15.

SPECIAL CASE—WRIGHT'S TRUSTEES AND OTHERS.

Trust—Heritage—Construction of Trust-Deed—Falsa Demonstratio—*Special Case.* Terms of a trust-deed under which two sisters of a truster *held* entitled to succeed to his whole heritable property.

Donation—Deposit-Receipt—Delivery—Indorsation—Upliftment. A gentleman who had received great attention and care from one of his sisters during a serious illness, for which he expressed his gratitude, intimated to her that he wished to make her a present. He deposited in bank, in a deposit-receipt, a sum of £500 in her name, and the deposit-receipt was delivered to her by the bank during his lifetime. Upon his death it turned out that the sister had indorsed the receipt, and that the brother had uplifted the contents. The sister had no recollection of subscribing the indorsement, and she was in the habit of signing documents for her brother, without knowing the purport thereof, having full confidence in his integrity. She did not intend by the indorsement to relinquish her right to the deposit-receipt. *Held* that there was no donation.

Observations by the Court on the rule applicable to the question of expenses in special cases.

This was a special case between the trustees and four sisters of the deceased John Wright, Esq., sometime merchant in Naples, thereafter residing at Largs Castle, Largs. The facts were as follows:—The said John Wright died on 26th December 1866, leaving heritable property of the value of £5450 or thereby, and moveable property of the value of £19,000 or thereby. He left a trust-disposition and settlement and codicil. The said John Wright was survived by four sisters, viz., the said Margaret Wright, Mary Wright, Mrs Agnes Wright or Howie, and Ann Wright. The said John Wright was, at the date of the said trust-disposition and settlement, and thereafter until his death, possessed of heritable property at Seamill or Kinningbrae, part of the lands of Kirktonhall in Ayrshire, which heritable property consisted of a piece of ground, extending to an acre and three-quarters or thereby, and having two cottages thereon, each cottage having attached thereto a portion of the said piece of ground extending (including the space occupied by the cottage) to fully three-quarters of an acre or thereby. The said heritable property was held on two leases granted to authors of the said John Wright—the ground on which one of the cottages was built being, with the relative portion of ground attached to the cottage in one of the leases, and the ground on which the other cottage was built being, with the relative portion of ground attached thereto, in the other lease. One of the said leases is dated 27th July 1807, and was for 354 years from 12th May 1807, and the other is dated 25th April 1808, and was for 361 years from Martinmas 1805. The said John Wright, on May 29, 1847, acquired right to the whole of the property foresaid (as held under the said leases respectively) by a deed of translation or assignation. The subjects contained in the said lease of 1807 are contiguous to those contained in the said lease of 1808, and the lessor in the lease of 1807 was the same as the lessor in the lease of 1808, viz., Francis Caldwell Ritchie, Esquire, of whose lands of Kirtonhall, the subjects contained in both of said leases formed part as aforesaid. The said Mary Wright and Agnes Wright or Howie were, at the date of the said trust-disposition and settlement, as they had for some years previously been, and as they continued until the death of the said John Wright to be, in the personal occupation and possession of the cottages and relative ground contained in the said leases. They so occupied and possessed rent free. The truster had, some years before his death, taken away from said cottages any household furniture, silver plate, plenishing and effects which belonged to him. The whole of the said John Wright's said heritable property at Seamill or Kinningbrae is claimed by the said Mary Wright and Agnes Wright or Howie, on the ground that it falls under the direction in the fourth purpose of the said trust-disposition and settlement. The trustees admit that this claim is well founded, so far as regards that portion of the said heritable property which is contained in the lease of 27th July 1807; but they maintain that it is not well founded so far as regards the remaining portion of the said heritable property, viz., the portion which is contained in the lease of 25th April 1808.

The above-mentioned purpose is as follows:—"Fourthly, To hold for behoof of, and if and when required, to assign, dispone, convey, and deliver to my sisters Mary Wright and Agnes Wright or Howie, and their heirs and assignees, my heritable property at Seamill or Kinningbrae, part of the lands of Kirktonhall in Ayrshire, and tack thereof between Francis Caldwell Ritchie of Kirktonhall and John Boyd, weaver of Kinningbrae, near Kilbride, dated the twenty-seventh day of July Eighteen hundred and seven, as described in the translation or assignation thereof, granted by James Howie, sometime merchant in Glasgow, in my favour, with my whole household furniture, silver plate, plenishing, and effects therein and thereupon."

Mr Wright returned from Naples to Scotland in 1849, and went to live with his said sister Margaret at Glasgow, she having a house there. They lived together at Glasgow till 1852, when Mr Wright, who had purchased Largs Castle at Largs, went there along with his sisters Margaret and Ann, and they kept house for him there until his death in 1866. Mr Wright was in bad health for some years before his death, and required constant and

careful attendance, which was given to him by his sister Margaret. He was grateful to her for this, and he informed her that, besides the provisions made for her by his will, he intended to make her a present. On the 2d day of November 1864 he deposited, with the branch of the City of Glasgow Bank at Largs, the sum of £500, and took the deposit-receipt therefor in name of and payable to the said Margaret Wright. He informed her of his having done so. The deposit-receipt was sent to her by the banker, and she kept it in her own custody, and under her own control, until she gave it back to her brother as hereinafter stated. Mr Wright's trust-disposition and settlement was executed in 1861, and he informed Mr MacKirdy, one of the trustees, that he had appointed him to be one of his trustees. Thereafter, in the months of November or December 1864, Mr Wright stated to Mr MacKirdy that he had made a present of £500 to his sister Margaret, in recompense for the attention she had shown to him during his long and severe illness. Mr MacKirdy expressed to him his satisfaction at hearing of this, and said to him it was an act of considerate kindness, and that it was only what was right and proper for him to do. Sometime afterwards, Mr Wright, at an interview between him and Mr MacKirdy, repeated to Mr MacKirdy the statement that he had made to his sister Margaret a present of £500. Mr Wright never made to his sister Margaret the present of any other sum of £500 than the sum contained in the said deposit-receipt. On Mr Wright's death, money was wanted to pay certain accounts, and as there was no money in the house at the time, the said Margaret Wright offered to lend such portion of the said sum of £500 as might be necessary. On application to the bank, it was then discovered that the money in the deposit-receipt had been withdrawn on 2d August 1865. This was done by Mr Wright. The deposit-receipt had been indorsed by the said Margaret Wright, but she had no recollection of having done so, and she has still no recollection of having done so. All that she recollects is, that her brother one day asked for the receipt, and she gave it to him. He did not state for what purpose he wanted it, and she, at the time, thought he meant to keep it for her. She frequently signed papers which her brother presented to her for her signature, and she did so without inquiring into the nature of the papers, or the reason of her signature being required, she having the fullest confidence in her brother's integrity. By delivering the deposit-receipt to her brother, she did not intend to return to him the present he had made her, and he never then or afterwards said to her that he meant to take back the present. The interest that had accrued on the money in August 1865, amounted to £13, 4s. 10d.; and this sum of interest, and the principal sum of £500, were included in a draft made payable to Mr Wright in Glasgow on 2d August 1865, which money he received. For sometime previous to his death, and as far back as August 1865, Mr Wright's memory was much impaired. Mr MacKirdy had much personal and confidential intercourse with him, and his belief is that Mr Wright only intended, by uplifting the money, to take a temporary loan of it to meet some immediate necessity; but that he intended afterwards to replace it, and forgot to do so. The other trustees do not know anything in regard to the matter, but the above is the firm belief of Mr MacKirdy, to whom Mr Wright several times spoke in reference to the present of £500 he had made to his sister Margaret. The said Margaret Wright now claims payment from Mr Wright's trustees of the sum of £500, with interest at the rate of 5 per cent. from 2d November 1864, which claim the trustees refuse.

The questions for the opinion and judgment of the Court are:—"(1) Whether the said Mary Wright and Agnes Wright or Howie are entitled to the whole of the said John Wright's foresaid heritable property at Seamill or Kinningbrae, or only to the portion thereof held under the said lease dated 27th July 1807? (2) Whether the said Margaret Wright's claim against the said John Wright's trustees for the sum of £500 is well founded? And if so, is she entitled to interest on that sum from 2d November 1864, or from any other date, and at what rate?"

FRASER for Wright's Trustees.

BLACK for other parties.

At advising—

LORD COWAN—(1) As the deceased Mr Wright acquired the subjects under the deed of translation or assignation of May 1847, and the bequest made to his two sisters specially refers to the subjects as described in the translation or assignation, I am of opinion that he intended to give to them his whole property at Seamill or Kinningbrae. The subjects were originally contained in two separate leases, and were held under them, respectively dated in 1807 and 1808, by the granter of the translation and assignation in Mr Wright's favour. But from the date of his acquisition of them, and at the date of his trust-deed, they were possessed by his two sisters as one subject of occupancy and possession given to them, with the household furniture, silverplate, &c., therein and thereupon, by their brother rent free. This being so, I think it clear that the direction in the fourth purpose of the trust-deed must be held to apply to the pieces of ground contained in both leases, although only one of them is mentioned in the description of the title, and that this omission, or false demonstration, as it may be called, cannot be permitted to affect the extent of the bequest actually intended and truly given, according to the sound construction of the other terms employed by the truster. Further, I think this view is consistent with the whole provisions of the trust-deed, by which the truster's intention to settle upon his sisters, and the issue of one who had predeceased, the whole of his heritable property, is sufficiently shown.

(2) On the second question there is some difficulty; but on repeated consideration of all the facts set forth in the case, I have arrived at the opinion that Margaret Wright's claim against the trustees is not well founded. Had the question arisen when the receipt for the £500, deposited in her name by her brother, and sent to her by his orders by the bank, was still in her custody and under her control, I hold that the legal inference must have been for donation, and that on her brother's decease in that state of matters his trustees or representatives could not have deprived her of the gift. But the actual state of the facts is different. The brother survived until December 1866; and on 2d August 1865, on his requisition, his sister delivered to him the deposit-receipt indorsed by her, and the amount was of that date withdrawn from the bank by the deceased, with the interest accruing thereon between its date, November 1864, and August 1865. The deposit-receipt was thereby cancelled. No voucher or written obligation of any

kind or to any effect was granted to his sister upon receiving from her the deposit-receipt. Nor does it appear from any statement in the case that she had asked from her brother any voucher or obligation. She voluntarily parted with the receipt simply upon his requisition, and so far from the £500 having been understood by the brother and sister to be hers from the date of the receipt, 2d November 1864, the interest on the amount was uplifted by the brother along with the principal sum. It appears to me that these facts are sufficient to destroy the presumption of donation that might otherwise have been legitimately applied to the case had the question arisen while the sister still had in her possession the deposit-receipt and kept it under her own control. The subsequent facts, on the contrary, lead to the legal inference that the temporary deposit in name of the sister was not intended to be an absolute gift to her, but was understood to be either for the temporary convenience of the brother, or at all events, if a donation, was one only *mortis causa* and capable of being revoked at any time during the donor's life.

As some remarks were made in course of the discussion as to the proper structure of a special case of this kind, I may say that I see no objection to the statement in this case as amended, upon which the opinion and judgment of the Court are asked. It is not a jury question that is submitted to us for decision. It is the legal inference resulting from the facts admitted in the case. A question of that kind falls within the description of cases to which the provision in the late statute may be most beneficially applied.

The other Judges concurred.

With regard to expenses, the Court found Miss Margaret Wright and Mrs Howie entitled to expenses so far as applicable to the first question; but, with regard to the question of alleged donation, they allowed no expenses against either party. It was observed that the rule as to expenses in special cases was not different from that applied in ordinary actions; and that, while expenses would in general be allowed out of a trust-estate where the questions at issue arose from ambiguities in the testator's settlement, it must not be supposed that every claim against trustees which had reasonable grounds, and was proper to be tried, was to be dealt with, as regards expenses, otherwise than in the ordinary way, merely because the suit was amicable, and took the form of a Special Case.

Agent for Wright's Trustees—D. Curror, S.S.C.
Agent for other Parties—G. K. Livingston, S.S.C.

Wednesday, March 16.

FIRST DIVISION.

CATTON *v.* MACKENZIE.

(*Ante*, p. 250.)

Judicial Factor—Sequestration—Entail—Possession

The Court *refused* to appoint a judicial factor on the petition of the beneficiary under a general disposition executed by the institute under an entail, as the next heir of entail had expede service, and the alleged invalidity of the entail was not so *prima facie* clear as to justify the Court in depriving him of the rents. Circumstances in which possession *held* not peaceable.

The late Hugh Mackenzie, Esquire of Dundonnell, died on 30th July 1869, leaving a trust-disposition and settlement, executed in 1854, with relative codicil, executed in 1864; both of which were recorded in the Books of Council and Session on 9th August 1869. By it Mr Mackenzie conveyed his whole estate, heritable and moveable, to trustees; and they, by assignation dated 18th and 20th December 1869, assigned the deed of trust to the extent of the general trust-disposition, to Mrs Catton, the sole beneficiary under it. Thereon she made up title, under the Titles to Lands Consolidation Act 1868, by a notarial instrument, which was recorded on 21st December in the General Register of Sasines.

Mr Mackenzie held Dundonnell as institute under an entail executed by his father in 1838. On his death in 1845, Mr Mackenzie completed a feudal title to the lands, conform to instrument of sasine in his favour dated 15th, and recorded in the General Register of Sasines 23d May 1845; and he continued in possession till his death in 1869. On his death, his brother, as next heir of entail, presented a petition for service in that character. This petition was opposed by Mrs Catton; but the Court held she had no title to oppose Dr Mackenzie's service.

On 10th December 1869 Mrs Catton brought an action of declarator to have it found that the deed of entail was invalid, or that at any rate its fetters were not directed against the institute; and that the entailed estate was therefore carried by Mr Mackenzie's general disposition. This action is still in dependence, and meanwhile some correspondence was carried on between the agents of the parties as to the collection of the rents, the bearing of which was a desire by the agents of Mrs Catton that the rents should be collected and consigned by Dr Mackenzie's agents till the action was decided. As no amicable arrangement could be effected, they intimated a protest against the rents being collected for Dr Mackenzie; and presented a note of suspension and interdict to have his agents interdicted from doing so. And they stated that they understood the rents that had been collected were collected by Messrs Skene & Peacock from Mr Skene being one of Mr Mackenzie's trustees.

Pending decision in the action of declarator, Mrs Catton presented a petition for the appointment of a judicial factor. This petition was opposed by Dr Mackenzie, on the ground that he had been served heir of tailzie and provision to his brother; was in possession of the estates; and had received the rents.

DUNCAN for petitioner.

SOLICITOR-GENERAL and SHAND in answer.

At advising—

LORD PRESIDENT—I am not inclined to think that this case can be disposed of on the ground of possession on one side or the other. Any possession which the respondent has had, has not been of a peaceable kind, but under protest from the petitioner. But there are various other circumstances of importance to be taken into view in disposing of a sequestration of this estate. The entail under which the lands are held was executed so recently as 1838; and the late proprietor, who was institute under the entail, made up his title under it on his father's death in 1845. The charter of resignation under the great seal which he obtained would of course contain the destination in the entail under which the respondent was heir of investiture; and he has been, as we have reason to know, served heir.