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.

The title of the petitioner is a general disposition by her father, the last heir in possession, in her favour; and if the entail is bad it will embrace the entailed lands, or if the last heir had power to disregard the entail. But it is necessary for the petitioner to go a step further, and state her objections in such a way as to make an impression on the Court that there is a *prima facie* case that the entail is bad. A record has been made up in this Court to have this entail declared invalid; and the objections to it have been stated before us by the petitioner's counsel. I do not see that these objections are fatal to the entail; but I may quite well be brought to see that they are. In the meantime the respondent is heir under that entail, and has been served heir; and I therefore think that we should refuse the petition.

The other Judges concurred.

Agents for Petitioner—Murray, Beith & Murray, W.S.

Agents for Respondent—W. F. Skene & Peacock, W.S.

Wednesday, March 16.

ROBSON *v.* BYWATER'S TRUSTEES.

Mora — *Taciturnity — Transactions importing discharge — Goods in communion — Abandonment.* Circumstances in which *held* that a claim made by a lady as executrix of her deceased husband for his share of the goods in communion between his father and mother at his mother's death in 1844, was barred by the actings of the parties, which imported a discharge of the claim, and by *mora* and taciturnity.

This was an action at the instance of Mrs Emily Rannie, formerly Bywaters now Robson against the trustees of her father-in-law Thomas Bywater (as executrix-dative of her former husband, John Thomas Bywater), for the purpose of recovering the share of the goods in communion to which the said John Thomas Bywater was entitled on the dissolution of the marriage of his parents by the death of his mother in 1844.

There had been no contract of marriage between Mr Thomas Bywater and his wife, and on the death of his two sisters intestate Mr John Thomas Bywater became sole heir and next of kin and representative of his mother, but during her life he never made up any title to the share of the goods in communion which belonged to him as her next of kin.

He was married to the pursuer in 1849, and died survived by his wife and three children in 1855. He left his wife, the present pursuer, residuary legatee. The executor named was his father Thomas Bywater, who, in the inventory of his estates given up for confirmation, did not include the value of the present claim.

Mr Bywater paid over to the pursuer the balance due to her under her husband's settlement, and received a receipt in the following terms:—

"3*d October* 1857.—Received from Mr Thomas Bywater the above balance of twenty-nine pounds and four shillings sterling, which is in full of all claim I have against him in reference to the estate of my late husband, and of his intromissions therewith."

Mrs John Thomas Bywater married her present husband, Mr Robson, in 1857. And in 1862 Mr Thomas Bywater also contracted a second marriage.

Mr Robson was employed by him at that time to make a settlement of his estate, which was done by two deeds. By one of these he disponed to himself in liferent and to the children of the pursuer in fee, stock and shares to the amount of £3000, and by the other he settled £2000 upon his second wife.

The defenders further alleged—"The said Thomas Bywater entered into the foresaid arrangements, and executed the foresaid deed of disposition and assignation in favour of his grandchildren in the faith and belief, induced by the pursuer Mr Robson, that he would be at liberty to dispose of the whole means which he then possessed, or might come to possess, other than what was included in the said disposition and assignation and marriage-contract. The said Thomas Bywater was exceedingly anxious that such power should be reserved to him in the event (which actually occurred) of his having to provide for a child or children of the second marriage; and the pursuer Mr Robson represented to and assured him that his whole estate, other than as aforesaid, was at his free disposal. *Inter alia*, the said pursuer, by letter dated 21st March 1862, written by him as law-agent of Mr Bywater, stated—'Your estate, so far as it exceeds £5000, together with future accumulations, can be disposed of by will, which can either be made now or hereafter. If you wish me to draft it now, I shall be happy to do so.' Had it not been for his belief that the fact was as has been stated, the said Thomas Bywater would not have executed the deeds above mentioned."

The pursuer answered—"Explained that Mr Robson had no knowledge of Thomas Bywater's circumstances or liabilities beyond what he himself disclosed in said correspondence, and Mr Robson never advised Mr Bywater that his general estate would not be affected by his debts. On the contrary, he expressly told Mr Bywater that the estimated surplus of his means, beyond the provisions then made, was applicable, in the first instance, to the payment of all his obligations. Mr Robson assumed that Mr Bywater, in estimating the value of his estate, made full allowance for all his liabilities. Mr Robson was then in entire ignorance of the existence of the liability forming the subject of this action, and could give no advice regarding it one way or the other. He knew nothing whatever of the affairs of the late Mrs Ann Bisset or Bywater; not even whether she had died testate or intestate, or whether there was any contract of marriage or other deed regulating her affairs."

Mr Bywater died in 1866, survived by his second wife, and a daughter by his second marriage. He also left a testamentary writing, by which he directed his trustees to pay over the surplus of his estate, after satisfying all his obligations, to his daughter by the second marriage.

The Lord Ordinary (BARCAPLE), in June 1868, remitted to an accountant to report the state of the goods in communion between Thomas Bywater and his wife Ann Bisset or Bywater at the dissolution of the marriage in 1844; and on 11th December 1869 pronounced the following interlocutor:—"The Lord Ordinary having heard counsel for the parties on the objections for both parties to the report of the accountant, and also on the closed record and whole pleas of parties, and considered the closed record and whole process; and the par-