

The Court sustained the objection stated for the Lord Advocate to the specification annexed to said notice of motion for pursuer, and in terms thereof deleted articles 3, 11, and 12, and from the words 'also all' on 6th line of article 9 to the end of the article.

Counsel for the Pursuer—Salvesen—Clyde. Agents—Drummond & Reid.

Counsel for the Defender Lindsay—Comrie Thomson—Younger. Counsel for the Defenders Jameson and Shanks—Guthrie—C. K. Mackenzie—Glegg. Agents—Menzies, Bruce Low, & Menzies.

Counsel for the Lord Advocate—Strachan.

Saturday, March 9.

FIRST DIVISION.

[Lord Stormonth Darling,
Ordinary.]

ROSS v. ROSS.

Compensation—Liquid and Illiquid Claims—Tutor and Ward—Retention.

A widow, who had acted for ten years as sole tutor and curator to her only son, brought an action against him, after he had attained majority, for payment of £2000 as arrears of annuities due to her out of the rents of heritable estates, in which he had succeeded his father. The defender admitted the sum sued for to be due, but pleaded compensation, on the ground that the pursuer owed him a far larger sum in respect (1) of the balance due by her of her intromissions, as tutor and curator and as an individual, with his property during his minority; (2) of the legitim due to him out of his father's moveable estate, of which the whole had been left to her; and (3) of the rents of farms belonging to the defender and occupied by the pursuer, for which no rent had been paid since the defender came of age. The defender explained that he had raised an action of count and reckoning against the pursuer, concluding for payment of £70,000 as the balance of her intromissions as his tutor and curator, and that he had also raised an action against her for payment of £30,000 as legitim. It appeared that in the accounts which the pursuer had lodged in the action of count and reckoning considerable sums were entered as expended, for which she stated that she had no vouchers; that in the course of her administration she had let various farms upon the estate to herself; and that in the action by her son for legitim she claimed a right to set off the capitalised value of the annuities, for the arrears of which she now sued.

The Lord Ordinary (Stormonth Dar-

ling) gave decree as craved, but the Court, in the special circumstances of the case, without recalling the Lord Ordinary's interlocutor, *superseded* the consideration of the case until the other actions should be disposed of—*Munro v. Macdougall's Executors*, March 30, 1866, 4 Macph. 687, *followed*.

The late Sir Charles Ross, Bart., of Balnagown, Ross-shire, who died 26th July 1883, left his widow, in addition to her rights under a contract of marriage and certain bonds of provision, his whole moveable estate, and she acted as sole tutor and curator to their only child, Sir Charles H. A. F. Lockhart Ross, Bart., who attained majority on 4th April 1893.

In June 1894 Lady Ross raised an action against her son for payment of £2000 as arrears of annuities provided to her either by her antenuptial contract of marriage or by bonds of provision out of the rents of the entailed and other estates in which the defender had succeeded his father. The defender did not dispute that this sum was due, but explained "that the pursuer is liable to pay the defender a far larger sum than that sued for in respect (1) of the balance due by her of her intromissions, as the defender's sole tutor and curator and as an individual, with the defender's property during his minority; (2) of the legitim due to him out of his father's moveable estate; (3) of the rents of farms belonging to the defender and occupied by the pursuer, for which no rent has been paid since the defender came of age. For the amount due under these headings reference is made to the defender's statement of facts."

In his statement of facts the defender stated —“(Stat. 1) The defender attained majority on 4th April 1893, his father having died on 26th July 1883. Between said dates the pursuer acted as his sole tutor and curator, and managed the whole estates. During the course of her management the pursuer entered into possession of various farms upon the estate, and herself fixed the rents which she was to pay in respect of her occupation. (Stat. 2) The defender has been obliged to raise an action of count, reckoning, and payment against the pursuer concluding for a sum of £70,000 as the balance of her intromissions, as sole tutor and curator foresaid, and as an individual. Various questions fall to be determined in said action, including, *inter alia*, the sufficiency of the rents so fixed by the pursuer. (Stat. 3) The defender had also been obliged to raise an action against the pursuer for the legitim due to him out of his father's moveable estate. Said estate amounted to about £60,000, and the legitim fund is one-half of said sum. . . . (Stat. 4) Since the defender's coming of age the pursuer has continued to occupy the majority of the farms occupied by her during her curatorship.” . . . He further stated that, even if the rents fixed by the pursuer herself were taken, arrears amounting to more than the sum now sued for were due to the defender for the farms occupied by pursuer for the period since he came of age.

He pleaded—" (1) Compensation. (2) The defender is entitled to be assolized in respect that the pursuer is due and resting owing to him a larger sum than that sued for."

The Lord Ordinary (STORMONTH DARLING) gave decree as craved.

The defender reclaimed; and argued—(1) He was entitled to have his plea of "compensation" sustained, because, although his claim was illiquid, it undoubtedly involved payment of a much larger sum than that now claimed by the pursuer; but (2) if the Court should find the pursuer entitled to decree, they should suspend the execution until the actions at the defender's instance, and which were now in Court, had been decided, by continuing the cause, as in the case of *Munro v. Macdonald's Executors*, March 30, 1866, 4 Macph. 687.

Argued for the pursuer—It was not disputed by the defender that the sum now asked was due or that his claims were illiquid. But it had been decided over and over again that illiquid claims could not be set off against liquid ones, e.g., *Thomson v. Thomson*, December 18, 1829, 8 S. 267; *Drew v. Drew*, March 2, 1855, 17 D. 359; *Stuart v. Stuart*, January 16, 1869, 7 Macph. 366, &c. The Lord Ordinary's interlocutor should be affirmed *simpliciter*.

At advising—

LORD ADAM—This is an action raised by Lady Ross against her son Sir Charles Ross for arrears of annuity due on Martinmas 1893 and Whitsunday 1894. No question arises about the annuity being due, but the defender pleads compensation in respect of certain debts said to be due to him by her, and these claims against her seem to be at present illiquid. Now, the Lord Ordinary has decreed in terms of the conclusions of the libel. We have no note to his opinion, but no doubt he followed the well-established rule that illiquid claims cannot be compensated or set off against liquid claims, and as the late Lord President said in the case of *Munro*, to which we were referred, I would be very unwilling to cast any doubt whatever upon such a well-established rule. But, as appears in that case, the rule is not without some exceptions, and it appears to me that there may be cases in which it is not desirable or necessary that immediate decree should be given for the sum claimed. Now, I think this is a very exceptional case. The defender's father died so long ago as 1883, and the pursuer then became sole tutrix and afterwards curatrix to her son, and had the sole management of the estates. The estates amount, as to annual rental, to something over—I suppose the gross rental—£16,000 a-year. Now, the defender came of age in 1892, and the result of the lady's administration is that for the ten years during which she had the sole administration of these large estates, she brought out a debit balance against him of some small amount. That is rather a startling fact. In the first place, this lady was bound in her character of tutrix and curatrix to her son to have kept clear accounts

of her administration. I have looked at the accounts originally lodged. They may be right or they may be wrong; I have nothing to do with that; but I observe that there is one item in these accounts, namely, an amount of about £38,000, which she charges against her son, and in a note with reference to that large sum of money she says, that that is the expense of keeping up the establishment, and adds—"I have no account to give of that large sum; I have no vouchers." She says that herself, and this lady, who has been acting in that capacity, brings these accounts into Court in that condition. She has also complicated matters by having let to herself several farms on the estate, and that is the way this lady has administered the estate of her son. Besides that, her husband, the late Sir Charles Ross, disposed in her favour his whole moveable estate, and her son has raised an action for legitim against her. Accounts have been put in in that action too. Of course I am not going to criticise the accounts, but I see from the abstract of her accounts that the gross value of the personal estate was stated to be £46,000 odds, and the debts which she charges against it amount to £42,000, leaving a balance to be divided into two sums of £3700. But in looking at the accounts I find entered a charge against her son of the value of an annuity of £2000 per annum in favour of the defender in terms of marriage-contract and bonds of provision calculated at 3½ per cent.—£23,840. That appears to me simply to come to this, that in that action she is claiming to retain the very sums for which she is now suing. These are, what I venture to say, circumstances so very exceptional that I do not think it would be consonant with justice to give this lady immediate decree for the sum she claims. I would therefore suggest to your Lordships to follow the course taken in the case of *Munro*, and supersede disposal of this reclaiming note until there should be some change of circumstances which would enable us more satisfactorily to dispose of it. I therefore propose that, without recalling the interlocutor of the Lord Ordinary, we should in the meantime supersede consideration of the reclaiming note, leaving it to either party to move when such change of circumstances occurs.

LORD M'LAREN—In disposing of the pleas in this case I think that the Lord Ordinary has rightly dealt with the plea of compensation, because that is a matter of statutory regulation, and the plea is confined to cases where both debts are liquid or capable of immediate ascertainment; but then there is another principle under which one obligation may be suspended until the performance of a counter-obligation—the principle of retention, and that, not being subject to the conditions of any statute, must be regarded as an equitable right to be applied by the Court according to the circumstances of each case as it shall arise. The doctrine has received much extension in cases of

bankruptcy and insolvency, where it is practically settled that anyone who has a claim against an insolvent estate is entitled to keep back money which he owes to the estate, and cannot be compelled to pay in full while he only receives a dividend. But the principle is not limited to bankruptcy cases, and it seems to me that the circumstances of the present case constitute a very clear ground for its application, because Lady Ross while in the management of her son's estates appears to have wholly neglected the duty of keeping strict accounts, which is incumbent upon every administrator of the property of others, and when she is called upon to account she states that the whole of the money has been expended, and that of a very large sum, amounting to nearly £4000 a-year, she is unable to give any particulars. Now, that is a position which no guardian or administrator is entitled to assume, and upon the statement of these accounts, and also the claim of legitim, I cannot doubt that, if it appears to the Court that there is a probability that Lady Ross has already in her hands as much of her son's money as would satisfy this jointure, she would not be entitled to immediate decree. The judgment which I understand your Lordship will pronounce will be one merely suspending the procedure in this case, and if it turns out, contrary to all the probabilities, that the whole of the son's income has been legitimately and properly expended by his mother, and also that there is no legitim due to him, then of course Lady Ross will be entitled to decree for her jointure.

LORD KINNEAR—I agree that it would not be safe to pronounce decree at this stage in the terms of the Lord Ordinary's interlocutor; and therefore I agree with Lord Adam in thinking that we should suspend consideration of the case in the meantime, leaving it to either party to move in the event of any change of circumstances.

The LORD PRESIDENT was absent at the hearing.

The Court superseded *hoc statu* further consideration of the cause.

Counsel for the Pursuer—Ure—Clyde.
Agents—Dundas & Wilson, C.S.

Counsel for the Defender—C. S. Dickson—Pitman. Agents—J. & F. Anderson, W.S.

Saturday, March 9.

FIRST DIVISION.

[Lord Low, Ordinary.

THOMSON & COMPANY v. SWANN
AND PATTISON, ELDER, & COMPANY.

*Reparation—Fraud—Charge of Fraud
against Copartnership—Relevancy.*

T. & Co. sued one of their travellers and the firm of P. E. & Co., conjunctly and severally, for damages, on the alleged grounds that their traveller, while under contract to them not to sell goods for any other person, had persistently acted, with the knowledge of P. E. & Co., and by pre-concert with them, as a traveller in their interest; that P. E. & Co. were fully aware of his actings in soliciting orders upon their behalf, and of the terms of his contract with the pursuers, and that said actings were wrongful and in breach of that contract.

The Court *dismissed* the action in respect that the sole ground upon which the defenders could be made conjunctly and severally liable was fraud, and that there was no allegation of fraud, which was essentially a personal matter, against any individual member of the firm of P. E. & Co.

William Swann was commercial traveller for Messrs R. H. Thomson & Company, wine merchants, Leith, under an agreement by which, *inter alia*, he bound and obliged himself not to sell any goods for any other person without receiving their consent in writing, and by which six months' notice was required if either party wished to terminate the contract of employment within five years. Before that time had elapsed Swann entered into a contract with Messrs Pattison, Elder, & Company, wine merchants, Leith, to become their traveller in a month, and gave notice to that effect to R. H. Thomson & Company, but upon their refusing to accept that notice as sufficient, agreed to continue in their service for six months. Within that period, however, R. H. Thomson & Company dismissed him, on the ground that in breach of his contract he had ceased to exert himself on their behalf, and was really acting in the interests of Pattison, Elder, & Company. They also brought an action of damages against him and Pattison, Elder, & Company, conjunctly and severally, for £1000. In this action they averred that Pattison, Elder, & Company were fully cognisant of the terms of Swann's contract with them. They also averred (Cond. 5) "that during said period, and while the defender Swann was in pursuers' service as aforesaid, he persistently acted, with the knowledge of Pattison, Elder, & Company and by pre-concert with them, as a traveller in their interest and behalf. In particular, he solicited and obtained orders from various customers of the pursuers for and on behalf of