Wednesday, February 19.

FIRST DIVISION.

(SINGLE BILLS.)

MERRILEES *v.* LECKIE'S TRUSTEES AND OTHERS.

Expenses—Trustees—Taxation.

Circumstances in which testamentary trustees who had unsuccessfully defended a trust-disposition in an action of reduction were *allowed* their expenses as between agent and client out of the trust estate, but not the expenses of a motion for a new trial.

Per the Lord President—"While I am far from wishing to countenance the idea that when a will is challenged trustees are entitled to defend at the expense of the trust estate, no matter what the circumstances may be, there is one consideration which will weigh with the Court, and it is—'what is said about the trustees.'"

On 3rd June 1907 Charles Merrilees, dentist, Dublin, raised an action against (*first*) the trustees acting under an alleged trust-disposition and settlement of the late Mrs A. G. Merrilees or Leckie, 4 James Street, Portobello; and (*second*) Mrs M. Beaton, wife of Duncan Beaton, 116 Stratford Street, Glasgow, and the said Duncan Beaton as her administrator-in-law and as an individual, and others, the beneficiaries thereunder, in which he sought reduction of the said deed. The trustees alone compeared.

The cause was tried before Lord M'Laren and a jury on 7th January 1908 and following days upon these issues—"(1) Whether the pretended trust-disposition and settlement dated 27th February 1907 . . . is not the deed of Mrs Annie Gordon Merrilees or Leckie, who resided at 4 James Street, Portobello? (2) Whether on or about 27th February 1907 the said Mrs Annie Gordon Merrilees or Leckie was weak and facile in mind and easily imposed upon; and whether the defenders Duncan Beaton, and Mrs Magdaline M'Laren M'Cann or Beaton, or one or other or both of them, taking advantage of her said weakness and facility, did, by fraud and circumvention, obtain from her the trust-disposition and settlement dated 27th February 1907 . . . to the lesion of the said Mrs Annie Gordon Merrilees or Leckie?"

The jury returned a unanimous verdict for the defenders on the first issue, and, by a majority of nine to three, a verdict for the pursuer upon the second. The defenders moved for a rule, but on 8th February the Court refused the motion, intimating that while the circumstances proved did not amount to fraudulent impetration, there was evidence of facility, of which advantage had been taken by the Beatons.

The pursuer now moved the Court to apply the verdict and to find him entitled to expenses against both the trustees and the trust estate. The defenders (the trustees) thereupon moved for expenses out of the trust estate. The pursuer opposed this.

The *facts* of the case were these—The testatrix was in her seventieth year when she died on 17th April 1907. She was a widow. The pursuer was one of her brothers, and Mrs Beaton a niece. By the alleged settlement, which was dated 27th February 1907, Mrs Beaton got the liferent of the residue of the estate, and her children, whom failing her husband, the fee. The estate amounted to £5000, and a legacy of £150 was left to pursuer, and another of £250 to another brother. The trustees were Mr R., the solicitor who had made the settlement, and Dr R., a doctor who had been called in by him to see the testatrix, another trustee having refused to act. The compearing defenders maintained that their *bona fides* and professional capacity were involved. So far as the record was concerned that contention was based upon the following averments by the pursuer:—"(Cond. 7) The trust-disposition and settlement now sought to be reduced bears to have been executed on 27th February 1907. It was prepared by the defender Mr J. R., who prior to that date was a total stranger to Mrs Leckie. Mr R. is the solicitor of the defender Duncan Beaton, who it is believed and averred brought Mr R. to Mrs Leckie's house for the purpose of having the said settlement executed in his and his family's favour. The defender Dr R. was also unknown to Mrs Leckie prior to the execution of the settlement, and was brought to witness it by Mr R. . . . (Cond. 8) . . . The pursuer, who was Mrs Leckie's sole acting next-of-kin in this country, . . . received intimation early in March from Mr G. A. S., solicitor, Aberdeen, who had acted as Mrs Leckie's solicitor prior to 27th February 1907, that he had been presented with a mandate bearing Mrs Leckie's signature demanding delivery of her papers in his hands to be made to the defender Mr R. . . . Mr S. having good reason to suspect Mrs Leckie's capacity to grant a mandate or any similar deed, was doubtful whether he was justified in delivering up his client's papers, but Mr R. instructed an action to be raised against Mr S. at once, failing immediate delivery to him of Mrs Leckie's papers, &c. Mr S. thereupon, with reluctance, complied with the demand, and handed over to Mr R.'s Aberdeen agents all the papers in his hands conform to inventory herewith produced. . . . It is believed and averred that a similar mandate was also obtained from Mrs Leckie addressed to her banker, instructing him to hand over to the said Mr J. R. all papers, &c., in his hands belonging to Mrs Leckie. On hearing of the state of matters from Mr S. the pursuer hastened to Edinburgh, where he arrived on 19th March to find Mrs Leckie gone and her house shut up. He then called on the defender Mr J. R. to ascertain where Mrs Leckie had been removed to, but was unable to find him. He, however, saw Mr R. on 23rd March, but Mr R. refused to disclose where Mrs Leckie was. . . . (Cond. 12) The said pretended trust-disposition and settlement is not the deed of the said Mrs Leckie. . . . In point of fact she did not give instructions for the prepara-

tion of the said deed, but was induced by the Beatons to sign it, being unable to resist the pressure which they exercised to get her to sign the deed, especially when a lawyer and doctor, who were both strangers to her, were brought with the deed. . ."

The pursuer's *evidence* showed that for many months prior to the execution of the will Mrs Leckie's mental faculties were deteriorating, and that the deterioration was gradual and progressive. A day or two before the will was executed she was unable to recognise intimate friends, and she died on 17th April 1907 from a disease in the brain which indicated that for a considerable time prior to death the brain had been deprived of a sufficient supply of blood, and that she would be rendered liable to be unduly affected by and to be unable to resist suggestions made to her. The pursuer led no direct evidence as to the circumstances relating to the instructions for and execution of the deed. The defenders' evidence was to the effect that Mr Beaton, after unsuccessfully trying to see two other law agents recommended by a friend, called on Mr R., who was also out, but with whose clerk he made an appointment for the next day. Mr R. was then informed that his services were required to make a will for his (Beaton's) wife's aunt. The interview was a very short one, but Mr R., upon being informed that Mrs Leckie was an elderly lady of sixty-five years of age, and in bed with a cold, requested that her doctor be in attendance to satisfy him as to her capacity. Being told that her late medical attendant was dead and that she had required no other since, Mr R. intimated that he would bring a doctor to examine Mrs Leckie. He engaged Dr R., a medical gentleman whom he knew, and who resided near his office. Accompanied by his clerk, Mr R. with Dr R. attended at Mrs Leckie's house next day, when she gave instructions for her will, which was at once, during the visit, drafted by Mr R., extended by his clerk in another room, and finally executed by Mrs Leckie. While Mrs Leckie was giving instructions for the will Mrs Beaton was present and actively intervened to remind Mrs Leckie of promises to remember her (Mrs Beaton) in the disposal of her estate. The provision in favour of Mr Beaton was entirely suggested to Mrs Leckie by Mr R., the solicitor. Both Mr R. and Dr R. were satisfied that Mrs Leckie thoroughly understood what she was doing, and Dr R., in addition to hearing all that passed, made a medical examination of her physical condition and engaged her in further conversation. Mrs Leckie was at a loss to think of trustees, and after some discussion Mr R. and Dr R. agreed to act along with another trustee nominated originally by herself. Mr R., the solicitor, was cross-examined as to the circumstances relating to the instructions for and execution of the will, and in his speech to the jury the pursuer's counsel commented on these circumstances, and especially on the hurried nature of the preparation and execution of the deed, and the fact that Mr R. had had some previous professional dealing with Mr Beaton.

After the verdict was returned, Lord M'Laren, the presiding Judge, intimated that the verdict involved no reflection upon Mr R., "who seemed to have acted quite fairly in a very difficult case."

Argued for the pursuer — The trustees were not entitled to their expenses out of the trust estate. No imputation was made against them, and that being so they ought, if they meant to defend the action, to have obtained from the Beatons, who had the real interest to maintain the will, a guarantee for their expenses so that they might be kept *indemnis*. Not having done so they were not entitled to expenses out of the trust estate. In any event, they were not entitled to expenses as between agent and client. As to the circumstances in which trustees who had unsuccessfully defended an action of reduction would be allowed expenses out of the trust estate reference was made to the following authorities:—M'Laren on Wills, section 2323; *Graham* v. *Marshall*, November 22, 1860, 23 D. 41: *Munro* v. *Strain*, June 18, 1874, 1 R. 1039, 11 S.L.R. 583; *Watson* v. *Watson's Trustees*, January 20, 1875, 2 R. 344, 12 S.L.R. 266; *Ross* v. *Ross's Trustees*, May 25, 1898, 25 R. 897, 35 S.L.R. 699; *Crichton* v. *Henderson's Trustees*, October 26, 1898, 1 F. 24, 36 S.L.R. 22.

Argued for the trustees—The cases cited by the pursuer showed that there was no absolute rule as to whether trustees who had unsuccessfully defended an action of reduction would be allowed expenses out of the trust estate. The matter lay entirely in the discretion of the Court. The evidence showed that the case was a fair one to try, and the trustees had acted reasonably and in good faith in defending the action. They ought therefore to be allowed their expenses out of the trust estate. The only scale applicable to such expenses was that of agent and client.

Lord President—There are two motions here. The first, which is made on behalf of the pursuer, is to find him entitled to expenses not only against the trustees but also against the trust estate. In the other, that on behalf of the defenders, who are the trustees and the unsuccessful parties in the action, we are asked to allow them their expenses out of the trust estate. There is also a subsidiary question as to whether, if the trustees are allowed expenses, these expenses are to be taxed as between party and party or as between agent and client.

As to the first, there is no question that the pursuer is entitled to his expenses against the trustees, and, apart from any difficulty as to mere matter of form, it would seem that a finding for expenses against the trustees would carry liability against the trust estate. In the present instance, however, I see no reason why the pursuer should not be allowed his expenses against both the trustees and the trust estate.

As regards the defenders' expenses, it

has been pointed out on several occasions that there is no absolute rule. While I am far from wishing to countenance the idea that when a will is challenged trustees are entitled to defend at the expense of the trust estate no matter what the circumstances may be, there is one consideration which will weigh with the Court, and it is this, "What is said about the trustees." Now, in the present case I do not think it necessary to pursue the inquiry minutely, further than to say that both Lord M'Laren, who tried the case, and my brother Lord Kinnear and myself, who gave the case very careful and special consideration, think that the trustees should be allowed expenses.

As to the scale on which these expenses ought to be taxed, it seems to me that once the trustees have been allowed their expenses, these expenses really become expenses of administration and not expenses of litigation. Accordingly, I do not see how we can apply to such expenses a scale which is appropriate to the domain of "litigation" and is not appropriate to the domain of "administration." No doubt the administration of an estate may have been so conducted as to disentitle trustees to any expenses, but in the present instance I see no reason why the trustees should not be allowed expenses as between agent and client.

LORD M'LAREN and LORD KINNEAR concurred.

LORD PEARSON was absent.

The Court found the pursuer entitled to expenses both against the compearing defenders (Mrs Leckie's trustees) and also against the trust estate, and found the defenders entitled to expenses as between agent and client (except the expenses in connection with the motion for a new trial) out of the trust estate.

Counsel for the Pursuer—Watt, K.C.—Lippe—Lyall Grant. Agents—Gardiner & Macfie, S.S.C.

Counsel for the Defenders—Crabb Watt, K.C. — Scott Brown — W. J. Robertson. Agent—John Robertson, Solicitor.

Thursday, February 20.

SECOND DIVISION.

[Lord Mackenzie, Ordinary.

HENDERSON (SOMETIME WILKIE) *v.* WILKIE.

Husband and Wife—Nullity of Marriage—Donation—Mutual Purposes—Recoverability—Analogy of Marriage Dissolved by Divorce—Opinions obiter.

Opinions (*obiter*) by Lords Stormonth Darling and Ardwall (*contra* Lord Mackenzie, Ordinary) that, as bearing on the question whether after decree of nullity of marriage one of the supposed spouses can recover from the other the amount of a donation made during the subsistence of the supposed marriage and spent on mutual purposes, no analogy can be drawn from the law applicable in similar circumstances to the case of a real marriage dissolved by decree of divorce.

In April 1906 Mrs Elizabeth Henderson or Wilkie raised this action against her husband, in which she sued him, *inter alia*, for £100.

Her averments were substantially that her father shortly after her marriage to the defender presented her with £100; that she asked her husband to lodge this sum in her bank account for her; that instead of doing so he, without any right or authority, appropriated the money to his own purposes.

The defender averred that the pursuer had given him the money as a donation, and that he had spent it with her knowledge upon mutual purposes. He further averred that the pursuer had committed adultery, on account of which he was raising divorce proceedings. The pursuer denied donation, consent to, or knowledge of, the expenditure of the £100 on mutual purposes, and adultery.

The pursuer pleaded, *inter alia*—"(1) The defender being due and resting-owing to the pursuer the sum of £100 and interest, decree should be granted therefor in terms of the first conclusion of the summons. (2) The said sum having been the property of the pursuer, and having been appropriated by defender without her consent, she is entitled to decree therefor as craved."

The defender pleaded, *inter alia*—"(4) The sum of £100 having been gifted to the defender, decree of absolvitor should be pronounced. (5) *Separatim*, the said sum of £100 being a donation between spouses, and the pursuer having been guilty of adultery, she cannot sue for the return thereof."

Subsequent to the raising of the action, on 12th May 1906, the husband raised an action of divorce against the wife on the ground of adultery, and the defender having denied adultery and averred that she was a virgin, on 21st November 1906, he brought an action of declarator of nullity of marriage on the ground of the wife's impotency. Decree of nullity of marriage was pronounced on 19th January 1907, and the wife was assoilzied in the action of divorce.

In June 1907 a proof was taken in the present action, and on 7th June the Lord Ordinary (MACKENZIE) assoilzied the defender from the petitory conclusion of the summons, and decerned.

Opinion.—"The first conclusion of this action (the only one about which there is dispute) is for payment of £100. The pursuer was married to the defender on 16th September 1902. They parted company on 6th March 1906, and decree of nullity of marriage was pronounced on 19th January 1907, in an action at the husband's instance.

"The £100 sued for represents the proceeds of a cheque which the wife handed