

Apply the verdict accordingly; and in respect thereof find that there is a public footpath or road for foot-passengers along the road or way in question, and that the pursuers and all others are entitled to the free use of such footpath or road for foot-passengers, and to that extent and effect decern in favour of the pursuers. *Quoad ultra*, assoilzie the defenders from the conclusions of the action, and decern: Find the pursuers liable to the defenders in expenses of process, subject to modification: Allow an account thereof to be given in, and remit to the auditor to tax the same and to report.

THOMS v. THOMS (*ante*, p. 42).

*Appeal to House of Lords.* Leave to appeal a judgment disallowing two issues *refused*.

Counsel for Pursuer—Mr Patton, Mr Gifford, and Mr Balfour. Agent—Mr A. J. Napier, W.S.

Counsel for Defenders—Mr Gordon, Mr Clark, and Mr Shand. Agents—Messrs, Hill, Reid, & Drummond, W.S.

In this case the Court, on 25th November, allowed the pursuer an issue for the purpose of proving that the deed sought to be reduced was impetrated from the deceased Mr Thoms by fraud; but disallowed two other issues, by which it was proposed to prove that he executed the deed under essential error, and under the belief that he was not conveying by it the entailed estate of Rungally.

The pursuer now moved for leave to appeal to the House of Lords the refusal of these two issues. He founded upon the fact that the Lord Ordinary thought the issues should have been granted, and also urged that the question involved was one of vital importance in the case. If the Court had not been unanimous in refusing the issues, the pursuer would have been entitled to appeal at this stage as a matter of right. The Act of Parliament prohibiting appeals of interlocutory judgments when the Court are unanimous was only passed to prevent frivolous appeals, and it could not be said that this was a proposal to appeal a frivolous point. There is no use of having a trial just now on the issue of fraud, and another trial possibly afterwards. The expense of one of these trials will be entirely saved by allowing an appeal at present. The defender can suffer no injury, because she is in full possession of the estate. The defender replied that she would suffer great hardship by the case being allowed to go to the House of Lords at this time. She and her agent, Mr Welch, were under a charge of fraud, which they were desirous to meet; and if leave to appeal was granted, this charge would be hanging over their heads untried for at least twelve months.

The Court refused to grant leave to appeal, and found the pursuer liable in the expense of the discussion. The matter was one of discretion; and in dealing with such questions the Court was in the habit of considering the advantages and disadvantages of granting or refusing leave. In this case, looking to the whole circumstances, and especially to the fact that the issue founded on fraud was still insisted in; it was right that the trial should proceed, and it was accordingly fixed for the March sittings.

Wednesday, Dec. 20.

PET.—THOMAS DALL.

*Bankruptcy—Acceleration of Dividend.* Section 133 of the Bankruptcy Act does not authorise the Lord Ordinary to accelerate payment of a dividend, except during the first six months after sequestration is awarded.

Counsel for Petitioner—Mr John Millar. Agent—Mr John Leishman, W.S.

This petition was presented by the trustee on the sequestrated estate of Robert Knox Wighton, jeweller in Edinburgh, craving authority to accelerate the

payment of a dividend to the creditors. The first dividend became payable in terms of the statute on 1st August 1865; but as there were not then funds available for the payment of a dividend the commissioners postponed the declaration of a dividend till the next statutory period, which will not arrive until 1st March 1866. Meanwhile, however, the trustee has realised as much as will pay to the creditors a dividend of 6s. 8d. per pound, and leave a surplus of £434. The creditors, at a meeting held on 5th December 1865, accordingly instructed the trustee to present this petition.

The Lord Ordinary (Mure) reported the petition, being doubtful whether section 133 of the Bankrupt Act, regulating the acceleration of dividends, contemplates the acceleration by the Lord Ordinary of a first dividend, except in the case where it is proposed to make a first dividend at an earlier period than the expiration of the six months from the date of the deliverance awarding sequestration; and whether the power applies to a case where, as here, it is wished to alter the period for payment of a first dividend long after the expiry of six months from the date of the deliverance awarding sequestration.

The Court remitted to the Lord Ordinary to refuse the prayer of the petition.

MACLEAN v. DUKE OF ARGYLL.

*Bankrupt—Caution for Expenses.* A pursuer of an action of damages for patrimonial loss having been sequestrated, and his trustee having refused to sist himself, ordained to find caution for expenses.

Counsel for Pursuer—The Solicitor-General and Mr F. W. Clark. Agents—Messrs Lindsay & Paterson, W.S.

Counsel for Defender—Mr J. G. Smith. Agent—Mr James Dalgleish, W.S.

This was an action of damages for patrimonial loss by a tenant of the Duke of Argyll against his Grace. The estates of the pursuer having been sequestrated during the dependence, intimation of the action was ordered to be made to the trustee, who declined to sist himself. The pursuer then proposed to insist in the action himself, but the Lord Ordinary (Jerviswoode) ordained him to find caution for expenses. The pursuer reclaimed, and urged that as the defender was the main creditor in the sequestration, the general rule as to finding caution for expenses in such cases as this did not apply.

The Court adhered. There was no doubt of the general rule; and although the Duke was the main creditor here, there were also other creditors to a considerable amount who do not instruct the trustee to prosecute the action.

## SECOND DIVISION.

DURNO v. LEYS.

*Reparation—Breach of Promise of Marriage.* Circumstances in which held (alt. Sheriff of Aberdeen) that a pursuer of an action for breach of promise of marriage had proved her case, and damages assessed at £25.

Counsel for the Pursuer (Advocator)—Mr Patton and Mr Gifford. Agent—Mr W. Scott Stuart, S.S.C.

Counsel for the Defender (Respondent)—The Solicitor-General and Mr W. M. Thomson. Agents—Messrs Jollie, Strong, & Henry, W.S.

This is an action of damages for breach of promise of marriage at the instance of Susan Durno, residing at Cushieston, in the parish of Rayne, and county of Aberdeen, against John Leys, a farmer in the neighbourhood. The pursuer states that the defender courted her and repeatedly asked her to marry him between May and November 1861; that she gave no definite answer but allowed him to visit her, except during harvest; and that on 8th November they formally pledged themselves to each other in marriage;

that trusting to the defender's repeated promises and entreaties, she has made preparations for the marriage according to the custom of the country. The pursuer's sister says that the pursuer had told her before Whitsunday that the defender had sought her, and that she was not to tell their mother that she was to be married to him; but her brother says that in June she told him that the defender had made a proposal of marriage to her, and that she preferred him to some others who were paying their addresses to her. The pursuer's own case is that she did not accept the defender till the 8th of November.

In regard to direct evidence—on which the discussion mainly turned in the Court here—all that the pursuer adduced is a statement by her mother that the defender on 9th November told her that he was going to marry the pursuer; and the evidence of the pursuer's brother, who says that the defender came to his house on the 11th of November, and in answer to his remark, "I understand you and Susan are to be married," replied, "Oh, ay; but it is likely to go against me for some time yet." The pursuer further relied upon a certain amount of intimacy between her and the defender, and his courtship, and also a common report about the marriage, which the defender never disclaimed. The defender, since the date of the alleged promise, and in December 1861, has married, and he alleged that between May and November of the same year he was engaged to his present wife. The Sheriff-Substitute (Watson) and the Sheriff (Davidson) adhering, found that the pursuer had not proved her case. The pursuer advocated.

To-day the Court altered these judgments, and found for the pursuer, assessing the damages to which she was entitled at £25. The Court proceeded mainly on the direct evidence of the pursuer's mother and her brother, holding that the question put by the latter and the defender's answer to it were not explainable on any other theory than an engagement. The Court also relied on the courtship of the defender and on the rumour of marriage, which he had not disclaimed.

Thursday, Dec. 21.

### FIRST DIVISION.

#### NELSON *v.* BLACK AND MORRISON.

*Reparation—Public Officer.* (1) Held that a pursuer of an action of damages against a procurator-fiscal for slander contained in a petition to a Sheriff, must take an issue of malice and want of probable cause. (2) Issue founded upon the obtaining of a warrant to search which was said to be illegal, but which was not executed, disallowed, no damage being relevantly averred.

Counsel for the Pursuer—Mr Watson and Mr M'Lean. Agent—Mr W. Miller, S.S.C.

Counsel for the Defenders—The Lord Advocate and Mr A. Moncrieff. Agents—Messrs Murray & Beith, W.S.

David Nelson, residing at Glenduckie, sued the defenders, who are joint Procurators-Fiscal of Fife, at Cupar, for damages (1) in respect of their having on 25th December 1864 presented a petition to the Sheriff of Fife, in which they falsely and calumniously represented the pursuer to have been participant in the crimes of conspiracy to take the life of Mr Edgar, the minister of Dunbog, and of Mr Ballingall, farmer, Dunbog, and of writing and sending certain threatening letters to them; and (2) in respect of their having wrongously applied for and obtained from the Sheriff-Substitute of Fife a warrant written on the foresaid petition to search the pursuer's dwelling-house and repositories, which warrant they thereafter published to several parties, to the loss, injury, and damage of the pursuer. The warrant to search, although executed against other parties was not executed against the pursuer. Mr

Bell of Glenduckie, one of the parties against whom it was executed, presented a suspension, and the warrant was set aside, so far as it regarded him, by the High Court of Justiciary. Other three parties—Mrs Black and her two sons—also obtained suspension. The present pursuer was proceeding to suspend the same when it was intimated to him that it had been withdrawn as against him. The defenders now admit that this withdrawal was not made till several days after the warrant had been obtained. The pursuer says he incurred considerable expense in preparing his suspension before the withdrawal had been intimated to him.

The case was before the Court upon a report by Lord Ormidale on issues. The pursuer contended that he was entitled to damages against the defenders for the slander contained in the petition, without proving that it was done maliciously and without probable cause, in respect the application was *ultra vires* of the defenders as fiscals; was not presented by them in the discharge of any official duty; and had been pronounced to be illegal by the Court of Justiciary in quashing the warrant. The pursuer also founded upon the opinions of the Judges of the Second Division of the Court in adjusting issues in an action of damages which had been raised by Mr Bell against the present defenders, which, he maintained, virtually decided the illegality of the defenders' whole proceedings (Bell *v.* Black and Morrison, 37 Jurist, 247 and 543).

The defenders, on the other hand, insisted that the pursuer was bound to put malice and want of probable cause in issue, in respect procurators-fiscal were privileged to this extent in the discharge of their official duty. This was a proceeding of that kind. The judgments of the High Court of Justiciary and of the Second Division only decided that the warrant was bad, and that the search made in Bell's case was illegal, and rendered the fiscals liable in damages without the necessity of alleging against them malice and want of probable cause. That did not dispose of the legality of the application by the defenders. As regarded the second issue there was no damage, in respect the warrant had never been executed.

Lord Ormidale reported favourably to the pursuer's contention upon the issues.

The case was debated upon Tuesday. To-day the Court gave judgment.

The LORD PRESIDENT delivered the leading judgment of the Court. His Lordship said—There are two issues proposed in this case. With regard to the first, the question seems to be limited to this—whether it is necessary for the pursuer to insert that the defenders' statements were made maliciously and without probable cause. This is a case of an application by the procurators-fiscal for a warrant for recovery of documents in reference to a charge of sending threatening letters, and to an alleged conspiracy to do violence to Mr Edgar and Mr Ballingall. In this application the pursuer says he was slandered, in respect he was falsely accused of having been participant in these crimes; and upon that footing seeks damages against the defenders. Procurators-fiscal have certain duties to discharge in the interests of justice, and in the ordinary discharge of such duties they are protected, unless it be proved that they acted maliciously and without probable cause. In this case it is said that it is not necessary for the pursuer to take such a burden of proof upon him, because the warrant which the defenders asked for and obtained was an illegal warrant, and being of such a kind was such as they were not entitled to ask; and so it is argued that they had no privilege in making the statements upon which they did ask it. Questions of nicety and difficulty may arise in some cases as to how far a procurator-fiscal is outwith the ordinary protection accorded by the law when he concludes a petition by asking something which he is not entitled to demand; and these questions must be determined by the nature of the illegality involved in the demand. If "to search reposi-