event of the said lease being set aside: Find that, as far as appears, no challenge of the said lease has been brought by the heir of entail now in possession of the estate of Ardgour, and that the pursuer is as yet in the undisturbed possession of the said farm under the said lease: Find that, in these circumstances, the pursuer is not *in hoc statu* entitled to decree in terms of the conclusions of the summons, Therefore, supersede further consideration of this process, reserving all further questions on the merits of the case, and all questions of expenses."

Counsel for Pursuer—Solicitor-General (Clark) Q.C., and Fraser. Agents—Murray, Beith, & Murray, W.S.

Counsel for Defenders—Millar, Q.C., and Adam. Agents—Tods, Murray & Jamieson, W.S.

*R.*, Clerk.

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*Thursday, June* 26.

## FIRST DIVISION.

[Lord Ormidale, Ordinary.

### DEAN *v.* WALKER.

*Expenses—Jury Trial.*

Circumstances in which a pursuer—who had obtained damages on one issue, but had been unsuccessful on all his own remaining issues and all the counter-issues—*held* not entitled to expenses.

In this case the pursuer had raised an action of damages against the defender on the ground of defamation—the said defamation consisting of charges of perjury, subornation of perjury, and certain abusive language. The jury affirmed the truth of the charges made against the pursuer, but in respect of the abusive language found him entitled to £300 of damages. The Lord Ordinary found neither party entitled to expenses, on the ground that the pursuer, though successful in obtaining damages, had been unsuccessful on all the counter-issues, and all but one of his own issues.

The pursuer reclaimed.

At advising—

Lord President—I do not think there is any fixed rule which forms a safe guide in such cases as this. The so-called rule established by the decisions in the cases of *Stoppel* and *Smellie's Trustees* goes no further than this, that when the Court is of opinion that the expenses should be divided, the mode of effecting that is not to be a mere haphazard division, but that they will ascertain through the Auditor what amount of expense is applicable to each branch of the case; and it seems to me that that is the only course we could take, namely, to remit to the Auditor to report. But we must not do that unless we are prepared to carry out his report. Now, I cannot say that I am prepared to do so, because it is quite possible that a very small part of the expense is attributable to the pursuer. The case is a peculiar one, and much difficulty arises from the fact that it is not easy to understand on what principle the jury found the verdict which they did for the pursuer. He charges against the defender no more than he admitted himself in the witness box, so that the verdict is really not intelligible, but still we must deal with it as we find it; and taking it as it stands I cannot say that the judgment of the Lord Ordinary does any injustice to either party, and I am besides disposed to pay great deference to the opinion of the Judge who presided at the trial.

The other Judges concurred.

Counsel for Pursuer—Fraser, Macdonald, and Robertson. Agents—Philip, Laing, & Munro, W.S.

Counsel for Defender—Millar, Q.C., Trayner, and J. A. Reid. Agent—W. G. Roy, S.S.C.

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*Saturday, June* 28.

## SECOND DIVISION.

### SPECIAL CASE—ALEXANDER'S TRUSTEES.

(*Ante*, vol. vii., p. 240.)

*Trust—Powers of Trustees—Vesting.*

A testator empowered his trustees "if they should think proper" to make advances to his children or grandchildren "not exceeding one-fourth of the estimated value of the share of such child or grandchild should they survive the term of division of the estate." *Held* that the trustees might exercise this power at any time during the subsistence of the trust, even prior to the period of division.

This was a Special Case brought by the trustees of Mr Alexander and his daughters. The facts upon which the parties were agreed were as follows:—

John Alexander, the truster, died at Edinburgh on 4th January 1869, leaving a trust-disposition and settlement and codicil. His family at his death consisted of Mrs Mary Walker or Alexander, his second wife, now his widow; Mrs Waters and Mrs Black, his only surviving children by his first marriage, neither of whom has had any children; Mrs Tait, Mrs Wilson, Mrs Smith, and Mrs Gregory, only surviving children of the truster's second marriage, all of whom have children. The truster had other children, but they predeceased him without leaving any issue. Mrs Waters, Mrs Black, Mrs Tait, Mrs Wilson, Mrs Smith, and Mrs Gregory, are respectively aged 43, 40, 37, 35, 29, and 23 years.

The truster's widow, Mrs Mary Walker or Alexander, who is now in the 60th year of her age, some time ago executed, and intimated to the trustees, a deed formally rejecting the provisions made in her favour by the truster in his settlement, and electing to take her legal rights.

In 1869, a Special Case was laid before the Second Division by the parties to the present case, and the truster's said widow and his grandchildren then existing. In that Special Case the opinion and judgment of the Court were requested on the following question, *inter alia*:—"Did the widow's rejection of her conventional provisions operate as an acceleration of what is called in the trust-disposition 'the term of payment' of the residue, to the effect of making it the duty of the trustees, after satisfying the widow's legal claims, to deal with the residue in the same manner as if the widow were naturally dead?" By interlocutor, dated 15th January 1870, their Lordships, *inter alia*, answered the said question in the affirmative. (See 8 Macph. 414, 7 Scottish Law Rep. 240.)

The net income derived from the heritable property for the year ending 31st July 1872 amounted to £379, 4s. 11d., the widow's terce from which was £72, 19s. 1d. The whole heritable property may be estimated at £7898, 19s. 6d., and the moveable property has been exhausted by the payment of debts.

The shares of residue destined in terms of the 9th purpose of the trust to the truster's daughters surviving the term of payment are held by the trustees themselves for the behoof of the daughters and their children.

In the administration of the trust, a difficulty arose as to whether the trustees were entitled to make to a daughter of the truster any, and if so what, advance, with reference to the "just and equal share" which the trustees are directed to hold or settle for behoof of such daughter in liferent allenarly, and of her children in fee.

The important clauses in the trust-disposition and settlement were as follows;—"And after satisfying these provisions, to divide the remaining proceeds thereof, if any, half-yearly, into as many parts as the number of my children who may be surviving at each division, and of my children who, though dead, may have left lawful issue surviving at such period of division, and to apply and pay one just and equal share thereof to or for behoof of each of my children who survive each division, and one just and equal share thereof (equally among them) to the surviving children of each of my children who may have died leaving lawful issue surviving at the period of division, and that at the usual terms of Whitsunday and Martinmas, until the period of division of the residue of my estate, as after provided. And I hereby declare that the shares of said proceeds falling to all my daughters shall be paid to them respectively upon their own receipt, or applied for their behoof as to my said trustees shall seem best, and that exclusive of the *jus mariti* or right of administration of any husbands they have married, or may hereafter marry; and the said payments are hereby declared to be purely alimentary to my said daughters, and not attachable for their debts or deeds, or by the diligence of creditors. (9th.) Upon the death of my said spouse, and the youngest of my said children having attained majority, or the whole of them being married, or in the event of my wife having predeceased me, then upon the youngest of my said children attaining majority, or upon the marriage of all my children, I direct my said trustees to make up a *vidimus* of my whole estate, including in the assets all advances made or to be made by me or by my said trustees to or on behalf of any of said beneficiaries, except the said advances to my four married daughters, in so far as they do not exceed £200 to each, which advances, except as aforesaid, are hereby declared to be a burden on, and to form a deduction from, the shares ultimately falling to the beneficiary to whom the said advances shall have been made, or their representatives; and after providing for the foresaid annuity to my said sister-in-law, if she be then alive, and paying any legacies I may bequeath by any writing under my hand, whether probative or not, I direct my said trustees, as soon as conveniently may be to divide the whole residue of my means and estate, heritable and moveable, into as many equal parts or shares as the number of my children then surviving, and of my children who may have died leaving lawful issue then surviving and to pay, assign, or dispone the same to all my children or grandchildren as follows, viz.:—One just and equal share to each of my sons then surviving, but under deduction as aforesaid of advances, if any, and one just and equal share, under deduction as aforesaid, (equally among them), to or for behoof (as my trustees shall think most expedient) of the children of each of my children who may have predeceased the said term of payment, leaving lawful issue then surviving; and with regard to the shares of said residue hereby given to each of my daughters surviving the term of payment, I direct my said trustees either themselves to hold the said shares, under deduction as aforesaid, or to settle the same in such way as that the same shall be held for behoof of my said daughters in liferent, for their liferent use allenarly, and for their children in fee, and to pay or settle so that there shall be paid respectively the whole annual income or produce of their said respective shares to my said daughters themselves alone, exclusive of the *jus mariti* and right of administration of any husband they have married, or may marry; and which income or produce so arising on said shares falling to my daughters, shall be purely alimentary, and not assignable by them or attachable by creditors; and I hereby give power to my said trustees, if they shall think proper, te make advances to my said children or grandchildren from my said estate, but not exceeding one-fourth of the estimated value of the share which would fall to such child or grandchildren, should they survive the term of division of my estate. And it is hereby declared that the amount of all advances made, or to be made by me, to or for behoof of my married daughters, beyond the said sum of £200 to each of them; as also the amount of any advances that may hereafter be made by me to any of my children or grandchildren, shall be sufficiently instructed by any writing or letter, formal or informal, which I may leave, or in any other way, and that the amount of any advances to be made by my said trustees shall be sufficiently instructed by any writing under their hands or the hands of their agents. And I declare the provisions above named in favour of my children to be in full of all claim of *legitim*, bairns' part of gear, portion natural, executry, or other claim arising to them on my death. And I hereby give my trustees and executors the most full and unlimited powers competent to trustees and executors by the law of Scotland."

The parties interested sought the opinion and judgment of the Court on the following questions of law:—(1.) Are the trustees entitled to make advances from the trust-estate to a daughter of the truster having issue? (2.) Are the trustees entitled to make such advances to a daughter of the truster having no issue? (3.) Are the trustees entitled to make such advances out of the capital of the share destined to such daughter and her children? (4.) Are the trustees entitled to make such advances to the extent of one-fourth of the estimated value of the capital mentioned in the third question, or to any, and if any, what extent? (5.) In the event of the trustees making an advance to any daughter of the truster, does such advance form a debt against such daughter, repayable by her to the trustees, with interest? (6.) Is it the duty of the trustees to retain

from such daughter the sums payable to her as liferentrix, until the amount of such advance, with interest, is repaid? (7.) If such advance, and all interest due thereon, or any part of such advance and interest, have not been repaid by such daughter at the time of her death, does the amount of the advance and interest, so far as the same have not been repaid, form a proper item of charge in the trust accounts? (8.) With the view of ascertaining the extent to which any advance may be made as aforesaid, are the trustees entitled to fix and determine the "estimated value" mentioned in the trust-deed, to the effect of binding all parties concerned?

At advising—

LORD COWAN—This trust-deed by the 9th purpose provides, that "upon the death of my said spouse and the youngest of my said children attaining majority, or upon the marriage of all my children," the trustees were to prepare a *vidimus* of his whole estate, and as soon as conveniently may be, to divide the whole residue into as many equal parts or shares as the number of his children then surviving, and of those who had died leaving lawful issue, and to give over the same to all his children or grandchildren in manner therein directed. He left no sons, and what is provided in the deed as to them has consequently not come into operation; but he left six daughters, two of them by his first marriage, and the other four by his second marriage. All these daughters are married. The two eldest have no children, the other four have each a family of children. Among these six daughters the residue of the estate is appointed to be divided upon the arrival of the term of payment, the trustees being directed "either themselves to hold the said shares," "or to settle the same, in such way as that the same shall be held for behoof of my said daughters in liferent for their liferent use allenarly, and for their children in fee."

On 15th January 1870, a Special Case was presented to the Court for opinion and judgment as to the effect upon the clause regulating the period of division and payment of the renunciation by the widow of her whole provisions under the deed, and her election to take her legal rights; and the Court found that the effect of this proceeding was to make it the duty of the trustees to deal with the residue of the estate in the same manner as if the widow were naturally dead. The consequence is that all the daughters being of age and married, the only condition has been purified upon which the period for division and payment is dependent, and the share of each of the daughters behoves now to be disposed of for their behoof in the manner provided by the deed.

The trust administration under the trust-settlement has come to a termination, or at least must be terminated by the trustees dealing with the shares severally given to the daughters, as they are directed and bound to do under the settlement. An option is left with the trustees either to hold the shares of the daughters or to settle the same upon them and their issue in such terms or on such a footing as shall ensure the accomplishment of the testator's will that the daughters should have the liferent for their liferent use allenarly of their several shares, and their issue the fee. There is no destination of the fee provided for in the event of any of the daughters having no issue.

The leading questions on which the opinion of the Court is now desired relate to a special power conferred by the deed upon the trustees, "if they shall think proper, to make advances to my said children or grandchildren from my said estate, but not exceeding one-fourth of the estimated value of the share which would fall to such child or grandchildren should they survive the term of division of my estate." This power, from its very terms, contemplates the exercise of it, if the trustees think fit, at any time during the subsistence of the original trust, and before the period of division and payment. I do not think it has any application to the shares to be severally held for or settled upon the daughters and their issue. The arrival of the period of payment, and the consequent division of the estate among the daughters, make it no longer possible for the trustees legally to exercise the power conferred by the deed. Nor can it affect this result that the trustees, with regard to any one of the shares or to all of them, have exercised the option of holding the several shares for the daughters and their families, in place of settling their shares on them in liferent, for their liferent use allenarly, and their issue in fee. The power to make advances out of the estate is not conferred in such terms as to permit of its being held applicable to that state of matters. I am of opinion, therefore, that the 1st and 2d queries must be answered in the negative, subject, however, to the observation that, as regards any of the daughters who have no children or who may become childless, they may possibly have a claim to the fee of their several shares as falling to them *ab intestato*, there being no destination of it failing issue. A question of this kind seems to have occurred in the case of *Nisbet* v. *Kerr*, referred to at the discussion. In that case it does not appear that the fee was provided to the children of the two daughters who had the liferent under the trust-deed. In this case it is different; and, although the daughters of the first marriage have at present no issue, the trustees are bound to hold to settle their shares to provide for the possibility of their having children, their age not being such as to remove that probability from the case, so as to place these daughters in any different position *in hoc statu* from that of the four daughters who have children to whatever right the parties may afterwards be held entitled.

The other Judges concurred.

Counsel for Parties of the First Part—Black. Agent—D. Curror, S.S.C.

Counsel for Parties of the Second Part—Lee. Agent—H. W. Cornillon, S.S.C.

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*Tuesday, July 1.*

## SECOND DIVISION.

[Lord Mackenzie, Ordinary

### A. B. *v.* C. D.

*Adjustment of Issues—"Fraudulent Misrepresentation or Fraudulent Concealment."*

Where certain legatees were stated to have induced the heirs at law of a testator to sign a deed to their prejudice by fraudulent concealment or misrepresentation.—*Held* that an