

of the relations of the parties to each other, because the defenders, while admitting that the whole excavation in the pit is, and has always been, done under contracts with regular practical limestone miners, *quoad ultra* deny the pursuer's allegations, and go on to explain that "the contractor employs and pays the bossers, benchers, and drawers, and others he may require to work along with him in excavating and removing the limestone from the face;" and say that "the defenders have no power to order or dismiss the contractors' men, who are in every way the servants of the contractors." Whether that qualification of what the pursuer says is or is not material I cannot say at present. At all events, what the pursuer says is not admitted by the defenders, and cannot enter into our judgment as being matter of fact. But all I need say is, that as far as the plea is maintained to the effect of excluding the issue, I am of opinion that it ought to be repelled, and repelled *simpliciter*. The inquiry may show after all there was no necessity for that plea, if the fact turns out to be other than that alleged by the pursuer.

¶ The Court repelled the plea in-law above quoted, and approved of the issue adjusted by the Lord Ordinary.

The action was afterwards compromised by the pursuer's acceptance of a tender of £115 with expenses.

Counsel for Pursuer—Ure. Agent—Robert Emslie, S.S.C.

Counsel for Defender—J. P. B. Robertson—Dickson. Agents—Webster, Will, & Ritchie, S.S.C.

Saturday, December 2.

SECOND DIVISION.

SPECIAL CASE—M'FADYEN v. M'FADYEN'S TRUSTEES.

Succession—Provision to Wife—Legal and Conventional Provision—Election.

A truster left to his widow the liferent of his dwelling-house, and gave her an absolute right to the furniture contained in it. He directed his trustees to allow her to carry on his business for behoof of herself and their children if she chose to do so, under burden of maintaining the children, she granting an obligation to the trustees that they might resume possession of the business. He empowered them to advance her on her personal bond £1000 of the trust funds to carry on the business. These provisions were declared to be in satisfaction of her legal rights. After the truster's death the widow, who had no separate adviser from the trustees, lived in the house with her children, carried on the business for herself and their maintenance, and received the advance of £1000. She granted an obligation to the trustees, by which she accepted the provisions of the settlement as in full of her legal rights "so long as she should continue to carry on the

business and the loan of £1000 remained unpaid." Four years after her husband's death she desired to re-marry, and to claim her legal rights in her first husband's estate. *Held* that in these circumstances she was entitled to do so.

This Special Case was adjusted between Mrs Janet Findlay or M'Fadyen, widow of Archibald M'Fadyen, manufacturer in Paisley and Glasgow, of the first part, and certain parties (of whom she was herself one), her husband's testamentary trustees, of the second part, under the following circumstances:—Archibald M'Fadyen, manufacturer in Paisley and Glasgow, died on 19th December 1878, leaving a trust-disposition and settlement by which he conveyed to the second parties, as trustees for the purposes therein mentioned, his whole means and estate. Besides his widow, the first party, M'Fadyen was survived by eight children of the marriage, a ninth having been born a few days after his death. At the date of this Special Case five of these children were in minority and three in pupillarity. The first purpose of the settlement was for payment of the testator's debts, &c. By the second purpose the testator directed his trustees to allow his widow the liferent of his house No. 31 Calside Street, Paisley, and to deliver to her for her absolute use his whole household furniture and plenishing. The annual value of the house, as stated in the valuation roll, was £47, 10s., and the value of the furniture, as stated in the inventory of the deceased's personal estate, was £154, 8s. By the third purpose of the settlement the testator directed the trustees to allow his widow, in her option, in case she survived him, and so long as she remained unmarried, to continue to carry on the business, or any part thereof, in which he might be engaged at the date of his death, for behoof of herself and his children, in alimending and supporting her and them. No power to carry on the business was conferred on the trustees. The testator further directed that an inventory and valuation of the stock-in-trade, or part thereof selected by her, should be made up, and that she should grant an obligation to the trustees that they could resume possession. He further empowered his trustees to lend to his widow part of the funds of the trust-estate, not exceeding £1000, to enable her to carry on the business, and that on such conditions as the trustees might consider proper. This provision was made under burden of her maintaining, clothing, and educating such of the testator's children as might be under eighteen years of age until they respectively attained that age; but in the event of the widow's income from the business proving inadequate for the maintenance of herself and the children the trustees were directed to supplement it from the testator's other estate. By the fifth purpose of the deed the testator directed his trustees, on the last of the following events occurring, viz., the death of the longer liver of himself and his wife, or the arrival of his youngest surviving child at twenty-one years of age, to realise his whole heritable and moveable estates, including the value of the stock and business entrusted to his widow, and such sum as might have been advanced to her to carry on the same, by offering the same at a valuation previously made to each of his children according to their seniority; and failing acceptance by all of his children the trustees were directed to dis-

pose of said stock-in-trade and business by public roup or private sale, as the trustees should think expedient. The trustees were directed to divide the free proceeds equally among the testator's children, born or to be born, share and share alike, the issue of predeceasing children taking their parent's share. The trustees were further authorised to sell any part of the trust property to any one or more of their own number, or the beneficiaries of the trust, at such price or prices as might be agreed on. The settlement further declared that the provisions therein made in favour of the testator's wife and children should be accepted by them in full satisfaction of all terce, *jus relictae*, legitim, portion-natural, bairn's part, executry, or others which they or either of them could demand in and through his decease; and that in case of their repudiating the settlement and claiming their legal provisions, or by any means preventing the settlement from taking effect, in whole or in part, then they should forfeit all right to any part of the testator's estate and effects which he might freely dispose of by law. In addition to the house at Calside Street, Paisley, and the household furniture therein, the value of the testator's estate at the date of his death was given up at £2795, 7s. 3d.

After the testator's death his trustees allowed the widow to continue in the occupancy of the house in Calside Street, Paisley, and to take possession of the household furniture therein; and at a meeting of trustees held on 29th May 1879 the widow formally intimated that she desired to continue the business so long as she remained unmarried for the purpose of alimending herself and her children. The trustees being advised that it was within their power to do so, and considering it expedient in the interests of the children, agreed to allow her to continue the business. The arrangements regarding the business were afterwards adjusted in the form of an obligation granted by the widow in favour of the trustees, dated 8th January 1880. By this obligation the widow became bound to deliver back to the trustees the stock and business so entrusted to her, and to allow the trustees to resume possession in the event of her resolving to marry again. The obligation further set forth that the trustees had, under the power to that effect conferred upon them by the testator, lent to the widow upon her personal bond, without security and without interest, the sum of £1000 out of the trust-funds, to enable her to carry on the business, and agreed to dispense with interest thereon in lieu of allowing her an equivalent sum as a supplementary annuity under said trust-disposition and settlement, in the event of her income being inadequate for the above purposes, on condition she gave her personal bond (which she had granted of the same date with the obligation), and had also delivered to her said household furniture and plenishing, and allowed her the liferent use and enjoyment of said heritable property at Calside Street, Paisley, and that it was just and proper she should accept of said provisions in full of all claims she might have against said estate so long as she continued to carry on said business and retained said sum for the aforesaid purposes. She therefore accepted these provisions in full of all claims she might have against her husband's estate, so long as she continued to carry on the business and retained the

sum of £1000 for the purposes thereof. The terms in which the obligation declared her acceptance of these provisions were that she accepted them "in full satisfaction of terce, *jus relictae*, or other right or claim whatsoever I can demand in and through his decease, or from the said estate, so long as I continue to carry on said business and the said loan of £1000 remains unpaid."

This Case was presented to the Court in consequence of the widow announcing that she was desirous of contracting a second marriage, and of doubts which consequently arose as to whether it was still competent for her to claim her legal rights.

The only question submitted for the opinion and judgment of the Court to which reference need here be made was—“(1) Is the first party entitled, upon giving up to the trustees the said business and stock-in-trade, or value thereof, and repaying the said advance of £1000, to claim terce and *jus relictae* out of his estate?”

Argued for the first party—A widow who accepts conventional provisions, even for a series of years, is not precluded from thereafter reverting to her legal rights, if that were done in ignorance of her legal position. Here the case is still stronger, for it was done under a condition. The widow had accepted the provisions of the settlement so long as she retained the loan of £1000 and continued the business.

Argued for the second parties—Having enjoyed her conventional provisions so long, the widow must be held to have made her election, by which she must now abide.

At advising—

LORD YOUNG—This is a Special Case, the leading question in which regards the right of a widow to repudiate her conventional provisions and betake herself to her legal rights. But the case may be presented also as a question of whether she ever made an election which would exclude her from claiming her legal rights. The material facts of the case are:—Her husband died in 1878 leaving a wife and several children. The amount which he left was very small, consisting of the property of the house in which he lived and died, in addition to property worth something over £2000, including the value of his business and stock-in-trade, and even that was diminished by some £361 of duties and sickbed and funeral expenses. By his settlement he left the liferent of the house to his widow, and directed his trustees to deliver to her absolutely the furniture in it, and no other provision. It was clear enough, therefore, that the only way for her to support herself and family was by continuing to carry on the business which her husband had conducted during his lifetime, which has been explained to us as a kind of manufactory of smallwares. He therefore directed his trustees that if she were willing to take it they were to allow her to carry it on for behoof of herself and the family. His widow might be willing to engage in business or not, and the continuance of the business was left in her option, for if she were not willing to do it the trustees would not have done so. For them to carry on a manufactory of smallwares was out of the question, so they appealed to the widow to carry it on, for she had nothing else except her liferent, and she consented, and the business was carried on accordingly for several years, and she and her

children were supported out of it. The trustees further, as authorised by the trust-deed, advanced to her £1000 of trust-money to enable her to carry it on. She now intimates that she desires to enter upon a second marriage, and the question is, whether having enjoyed the liferent of the house and the furniture, she is to be held as having so elected to take her conventional provisions as to deprive herself of the right to claim terce and *jus relictæ*, and further, irrespective of the deed or of the provisions, whether her conduct has not deprived her of this right? All she did was to live in the house with her children. That was not making an election so as to deprive her of any right. She must of necessity, with her young family, have lived in the house. Her consent to carry on the business was the only possible means in the circumstances of supporting herself and family. I am clearly of opinion that there has been no election here. Then comes the deed of obligation. This is a very singular deed. It is not a very favourable specimen of conveyancing, but I think the trustees, and the legal advisers under whose advice they acted, did not properly understand the position of matters, and it would be very natural for the widow to mistake her position. On the matter of election I do not think the terms of this deed are such as to signify much one way or the other. On the whole, I am of opinion that the widow is now entitled to claim her legal rights. But that will make little difference after all; she will have now one-third of the moveable estate (including a third of the value of the business and the stock-in-trade) and a third of the rents of the house, for terce I assume is payable out of this house—that is to say, a third of the liferent instead of the whole liferent as before. The other way she would have had the whole of the furniture.

The trustees ask further, in the event of the first question being answered in the way I propose we should answer it—Whether they are entitled to make over to the widow the business and stock-in-trade in settlement, or in settlement *pro tanto*, of her legal claim; and if so, whether the business and stock-in-trade may be made over at the valuation set forth in the widow's obligation? The stock-in-trade of course will have to be taken into consideration as part of the estate out of which the widow's legal provisions are payable, but it is only on the first question that I offer an opinion.

LORD CRAIGHILL—[After stating the facts of the case]—The first party has now intimated that she is about to enter into a second marriage, and she has claimed from the trustees her legal provisions in place of the provisions bequeathed by her husband. The trustees being of opinion that she had accepted of her conventional provisions, did not feel at liberty to recognise this claim, and accordingly it was arranged that this and the other questions connected with it should be presented for the opinion and judgment of the Court.

The first question—and it is the only one on which parties have been heard—is, “Is the first party entitled, upon giving up to the trustees the said business and stock-in-trade, or value thereof, and repaying the said advance of £1000, to claim terce and *jus relictæ* out of his estate?” My opinion is that this question ought to be

answered in the affirmative. The first party cannot be held to have elected to accept of the testamentary provisions as in room and satisfaction of her legal right. She no doubt has continued to live with her children in the house in Calside Street, Paisley, the liferent of which the trustees were directed to allow her. But this comes to nothing more than her continuance to live in the house in which she and her husband and their children had lived before his death. The arrangement was convenient for all concerned; and leaving out of sight for the present the arrangement regarding the business, and the obligation subsequently granted, there was nothing in the conduct of the widow which amounted to any election to accept of the conventional provisions as in satisfaction of her legal rights. The trustees, if they are to refuse the widow's legal provisions, must show that the conventional provisions were accepted, and her continuing to live in the house, and to use the furniture as before her husband's death, her children remaining with her, does not prove the fact.

It is said, however, that the business was taken in trust, and that £1000 was received in loan from the trustees, but this is no evidence of election of those provisions which were left in substitution for the widow's legal rights. Mrs M'Fadyen was allowed an option to carry on the business while she remained a widow, and the trustees were authorised to lend her £1000 as capital by which this purpose might be accomplished. If she had refused to continue to carry on the business she would not thereby have forfeited her conventional provisions; nor by exercising her option to carry it on did she forfeit her claim to her legal rights, if the conventional provisions had not otherwise been accepted. The result therefore is, that up to this time nothing had been done by which the widow was foreclosed from claiming her legal rights. The obligation, however, is said to be an acknowledgment that the conventional provisions had been accepted. Now, it appears that this deed was framed by the agent of the trustees, and he acted for the widow also. Everything, no doubt, was fairly and honourably conducted, but in the circumstances, if there be clauses assuming to bear hard upon the widow, as well as others which seem to be in her favour, they must be liberally construed. The deed must have effect, for it is not challenged, but in construing its terms the circumstance to which allusion has been made may, nay, ought more or less to influence the interpretation.

There is no doubt that by this obligation the widow acknowledged that the trustees had delivered to her the household furniture and furnishings; that she thereby accepted and declared the said provisions conceived in her favour as an individual, and in trust as aforesaid, to be in full satisfaction of all terce, *jus relictæ*, or other right or claim whatsoever she could demand through her husband's decease or from his said estates; and if there had been no qualification upon this declaration the contention maintained by the trustees must have been allowed. But then the declaration is subject to the qualification that what she took was in satisfaction of all she could demand from her husband's estates only so long as she continued to carry on said business and the said loan of £1000 remains unpaid. This clause cannot be said to be happily framed, but the interpretation most favourable to the widow is that

which must be adopted. My reading of it is that there was no final or absolute election of the conventional as in place of the widow's legal provisions, but that the arrangement which was concluded and carried out was to endure only so long as she might remain unmarried. On her second marriage the business was to be restored, the loan of £1000 repaid, and then she might, if she were so disposed, claim her legal rights in place of her conventional provisions. This she has done, and I think the claim ought to be allowed.

LORD RUTHERFURD CLARK—I have had rather more difficulty in coming to a conclusion, but I have now come to concur in the view already expressed.

LORD JUSTICE-CLERK—I have had considerable difficulty in coming to a conclusion on one branch of the case. The arrangement as to carrying on the business is a peculiar feature. Had there been nothing else in the case than the liferent of the house and the legacy of the furniture, I should have been of opinion that the widow, having taken and enjoyed her conventional provisions, was precluded from now resorting to her legal rights. Though I do not quite follow the argument that so long as she chose to go on the footing of the arrangement about the business she was entitled indefinitely to postpone her election, I am nevertheless of opinion in this case that the election, whether intended to have been made or not, does not matter here, because both the trustees and the widow were in error as to the true position of matters, and that she is therefore still entitled to claim her legal rights.

LORD YOUNG—I would just add a reason for my view in the case, and it is this, that I am of opinion that the election could now be made without involving injustice to anyone. Matters are still practically entire, and the change proposed would not now put anyone into a worse position than if she had made her election at the time of the testator's death.

The Court answered in the affirmative the question quoted above.

Counsel for First Party (Widow)—Mackintosh—Ure. Agents—Fraser, Stodart, & Ballingall, W.S.

Counsel for Second Parties (the Trustees)—J. P. B. Robertson—Begg. Agent—D. Lister Shand, W.S.

Saturday, December 2.

FIRST DIVISION.

FRASERS v. THE EDINBURGH STREET TRAMWAYS COMPANY.

Reparation—Street—Carriage—Child Run Over by Tramway Car—Contributory Negligence—New Trial.

In an action of damages for injuries received by a boy six years old who was run over by a tramway car while attempting to cross a street, it was proved (1) that the car

was being driven faster than the legal rate of six miles an hour; (2) that there was nothing to prevent the boy from seeing the car approaching; (3) that from the pavement to the furthest rail was a distance of 17 feet which the boy had to traverse before he could reach a place of safety; and (4) that when the boy started from the pavement the tramway car was only about 15 feet from the point at which he attempted to cross the rails. The verdict was for the pursuer. The Court granted a new trial on the ground that the boy had been guilty of contributory negligence.

Process—Jury Trial—Expenses—New Trial.

Where a new trial is granted, the ordinary rule is to reserve the expenses of the first trial to await the result of the second.

This was an action at the instance of Robert Fraser, a boy of six years of age, and Thomas Fraser, his father, against the Edinburgh Street Tramways Company (Limited), concluding for £250 as damages for injuries caused to Robert Fraser by a car belonging to the defenders. The pursuers averred that on 28th November 1881, while Robert Fraser was crossing Constitution Street, Leith, the defenders' car, "which was being driven furiously and recklessly, knocked down and ran over him," and that in consequence of the injuries then sustained it was found necessary to amputate the forefinger of the left hand, and that the middle finger was permanently injured.

The material facts of the case are fully detailed in the opinions of the Judges, *infra*.

An issue was tried before Lord Fraser and a jury on 9th November 1882, when a verdict was returned for the pursuer assessing the damages at £150. The defenders obtained a rule on the pursuer to show cause why the verdict should not be set aside. The grounds on which the defenders rested their motion were (1) that the verdict was contrary to evidence, (2) that the pursuer was guilty of contributory negligence, and (3) that the damages were excessive.

The pursuers now showed cause, and argued—The *onus* of proving contributory negligence was on the defenders, and they had failed to discharge it.

Replied for the defenders—In this case contributory negligence had been proved.

Authorities—*Grant v. The Caledonian Railway Company*, December 10, 1870, 9 Macph. 258; *Auld v. M'Beay*, February 17, 1881, 8 R. 495; *Abbott v. Macfie*, 33 L.J. (Exch.) 177; *Mangan v. Atherton*, L.R. 1 (Exch.) 239; *Campbell v. Ord and Madison*, November 5, 1873, 1 R. 149; *Lynch v. Nardin*, 1 Ad. & E. 29; *Grant v. The Glasgow Dairy Company*, December 1, 1881, 9 R. 182.

At advising—

LORD PRESIDENT—The issue in this case is—"Whether on or about the 28th day of November 1881, and while crossing Constitution Street, Leith, at or near Coatfield Lane there, the pursuer Robert Fraser was knocked down by a car belonging to the defenders, and suffered severe bodily harm, through the fault of the defenders, to the loss, injury, and damage of the said pursuer?" The only fault alleged on record is, that