

Wednesday, July 15.

FIRST DIVISION.

[Lord Lee, Ordinary.]

EVANS v. STOOL AND OTHERS (STOOL'S  
EXECUTORS).

*Reparation—Seduction—Solatium—Transmission of Action against Executor of Wrongdoer—Title to Sue.*

*Held (diss. Lord Shand)* that a claim of damages for *solatium* not pursued during the wrongdoer's life may be competent against his estate in the hands of representatives.

A woman raised an action against the representatives of a man deceased alleging that she had been married to him on the faith of his representations that he was then single, that it had transpired since his death that he was then a married man, and that thus she had been seduced under colour of marriage. *Held* that the action was competent.

This was an action of damages at the instance of Fanny Evans or Evans, wife of William Evans (and William Evans for his interest), against Amelia Stewart or Stool and others as representatives of the deceased Alexander Stool, a seaman.

The pursuer averred, and it was admitted, that in 1860 Stool was married to the defender Amelia Stewart or Stool. The pursuer averred that she became aware of this fact only a short time before the raising of this action.

She further averred that in 1867 she herself became acquainted with Stool in Liverpool, that he represented himself as an unmarried man and courted her, and frequently asked her to marry him, which she ultimately consented to do; that she had at the time several other good offers of marriage with persons named and designed; that in 1868 she married Stool in the belief that, as he represented to her and set forth in the schedule filled up by him at the time of the marriage, he was a bachelor, whereas he was truly, and knew himself to be, still married to the defender Amelia Stewart or Stool; that thereafter he had intercourse with her (pursuer) as her husband, and so seduced her under colour of marriage; that he sailed on a voyage to Calcutta a month after the marriage after giving her £10 and allotment-notes entitling her to draw half his pay; that he died of cholera at Calcutta on 9th May 1869, and she received, after exhibition of her marriage lines, a small balance (£4, 16s. 9d.) of the residue of his effects; that she lived as a widow till 1872, when she married her present husband.

The pursuer also stated (Cond. 6) that she learned of Stool's previous marriage owing to his representatives having presented and advertised a petition under the Presumption of Life Act 1880 to make up a title to a succession which had opened to him from the estate of his grandfather.

The pursuer pleaded that she having been induced by Stool's fraud and concealment to marry and cohabit with him, she was entitled to damages out of his estate.

The defenders pleaded that the action was irrelevant.

On 20th May 1885 the Lord Ordinary appointed

the pursuers to lodge the issue which they proposed for the trial of the cause.

*Opinion.*—In this case the pursuers claim damages from the defenders, as representatives of the deceased Alexander Stool, on account of the alleged seduction of the female pursuer by Alexander Stool in the year 1868. The claim is certainly remote. Alexander Stool died in 1869, and the female pursuer was married to her present husband in 1872. But the averment is that she was induced to go through a ceremony of marriage and to cohabit with Alexander Stool by a representation that he was a single man; whereas it now appears that he was at the time married to the defender Amelia Stewart or Stool, and that the female pursuer's claims upon his estate, consisting chiefly of an interest which he possessed in the succession of his grandfather, have been defeated or lost.

"I am not prepared to say that there is no relevant allegation of damage. If the pursuer's averments are true, she was entitled to rely upon, and to look forward to receiving a share of any estate which might belong to Alexander Stool at the date of his death, and if her prospects as the reputed wife of Alexander Stool have been defeated by a fraud which he committed upon her in prevailing upon her to accept him as a husband, it appears to me that her claim of damages may include not merely *solatium* for the injury which she sustained by surrendering her person to a married man, but something of the nature of patrimonial loss.

"In this state of matters the plea that a claim of damages for seduction does not transmit against the representatives of the wrongdoer is in my opinion untenable, and I think that the authorities cited for the defenders do not support it—*M. Naughton v. Robertson*, Feb. 17, 1809, F.C.; *Morrison v. Cameron*, May 25, 1809, F.C. These cases recognise it as a settled point that when damage has arisen by delinquency the obligation to make reparation is a debt which is no more extinguished by the death of the debtor than any other debt. The passage cited from *Erskine* (iv. 1, 14) is really to the same effect.

"In practice, accordingly, no such plea appears to have been sustained in Scotland against a claim of damages arising from delinquency. No such plea was stated in the case of *Milne v. Gauld's Trustees*, 3 D. 395, where the action (one of damages for wrongous imprisonment) was raised against the representatives of the deceased wrongdoer. I see no reason whatever to doubt the doctrine stated in *Fraser on Husband and Wife* i. 505, that a claim of damages like the present 'may be made against the heirs and representatives of the seducer.'

The defender reclaimed, and argued—This was a penal action, which could not transmit against the representatives of the wrongdoer. The claim here was not of the nature of a debt. It was not patrimonial loss, it was only an imaginary wrong, and it was truly *solatium* which was sought. The pursuer was a domiciled Englishwoman, and by the law of England no such claim could be made. The amount claimed was extravagant. The value of the estate was only £500, and that was the utmost that could be claimed. In order that the action might transmit to representatives of the wrongdoer there must be

real damage. No real damage could be shown in the present case.

Authorities—*M'Naughton v. Robertson*, February 17, 1809, F.C.; *Calder v. Mackenzie's Trs.*, M. voce Pers. and Trans., App. 2; *Montgomery*, M. 10,360; *Lewans v. Carmichael*, M. 10,348; *Wight v. Burns*, November 30, 1883, 11 R. 217; *Erskine*, ii. 3, 90, and iv. 1, 14; *Callender v. Milligan*, June 20, 1849, 11 D. 1174.

Replied for pursuer—The action was for more than *solatium*, for the pursuer had sustained real damage. In such a case the right of action at the instance of the injured party transmitted against the representatives of the wrongdoer. A relevant ground of action had been averred.

Authorities—*Mackay*, i. p. 369; *Munro v. Wishart*, M. 10,337, and cases cited by the Lord Ordinary.

At advising—

LOED PRESIDENT—The circumstances of this case are very remarkable, in fact they are unprecedented. The pursuer's averments amount, I think, to this—The pursuer became acquainted with the late Alexander Stool in 1867, and he then courted her, and pressed her to become his wife. At that time she was courted by others, and she says that she received offers of marriage from others who were equally eligible, but in the end she accepted Stool. They were married in Liverpool on the 9th of November 1868, and from that time until 12th December following cohabited as husband and wife in the neighbourhood of Mount Vernon, and were known to their friends as married persons. Both were then comparatively young, the man being thirty and the pursuer twenty-five. In December 1868 Stool sailed for Calcutta, and never returned, as he died of cholera in Calcutta on 9th May 1869. Before he left this country he gave the pursuer a sum of £10 to enable her to maintain herself, and she also received allotment-notes entitling her to draw one-half of his pay—that is to say, £2 monthly—and these payments were continued until May 1869, when he died. After Stool's death his effects were sold by the shipping authorities in Calcutta, and the balance was transmitted to the office of the Board of Trade in London, to remain there until claimed. The pursuer claimed and received payment of this balance, which was no doubt small, but it was all that Stool left, amounting to £4, 16s. 9d. From the date of Stool's death until 1872 the pursuer lived as a widow. On 22d July 1872 she married her present husband, in Liverpool also I think, and from that time down to the present the female pursuer and her husband have lived as man and wife. The pursuer then goes on to say that she has recently learned that Alexander Stool at the date when he married her was already married, and had been married to the defender Amelia Stewart on 3d December 1860 at Dundee. She then proceeds to aver that (Cond 8) "By and through the gross fraud so practised upon her by the said Alexander Stool, in having induced the female pursuer, by means of a pretended marriage with him, to cohabit and have conjugal intercourse with him as his wife, the female pursuer sustained great and irreparable injury to her prospects, and she, as well as her

husband, have sustained and will sustain serious loss, injury, and damage in their feelings, character, and reputation, and for the damage so sustained and to be sustained the amount concluded for is reasonable and moderate."

This action, of course, was brought after the death of Alexander Stool—a very great many years after—because Stool died in 1869, and it is directed against his executors, for it turns out that Stool was richer than was supposed, and the interest that he had in a succession has been taken up by his executors. The defenders maintain that these averments are "irrelevant and insufficient in law to support the conclusions of the summons." But the plea that was maintained was not a plea of irrelevancy, but of incompetency, and it was contended that a claim of this sort does not transmit against the representatives of the wrongdoer. That raises an important question, and although there is no plea stated on record, the Lord Ordinary has considered that question and dealt with it, for in his note he says—"The plea that a claim of damages for seduction does not transmit against the representatives of the wrongdoer is in my opinion untenable." Now, there is just this further peculiarity to be added to the facts I have already mentioned, that I do not think it is possible for the pursuer or her husband, or both of them jointly, to specify any real damage which they have suffered in consequence of the fact that the pursuer during a certain number of months in the year 1868 lived as Alexander Stool's wife, having been induced to do so by a fraudulent marriage. But though the pursuer is not able to condescend upon any real damage, yet it was maintained for her that when a woman is seduced under pretence of marriage by a man who turns out to be already married, damages are due to her by way of *solatium* in respect of the fraud. That is the peculiarity that gives particular interest to the question whether the claim transmits against the representatives of the wrongdoer. We are not here concerned with any question as to the transmission of an action raised during the life of the wrongdoer, because the pursuer raised no action during the lifetime of the party who did the wrong. Now, it seems to be settled by authority that a penal action will not transmit against the representatives of the wrongdoer, but that a claim for damages or reparation, which is a civil debt, will transmit though the delict in respect of which damages are asked would have involved the delinquent in criminal consequences. But the question was argued very strenuously that there was no transmission of a claim which was not a claim for reparation of distinct pecuniary loss but merely a claim for *solatium*. If there were any authority for that proposition I should be quite willing to give effect to it, for here the claim of the pursuer is certainly of a very shadowy nature. But I am quite unable to say upon authority, and still less upon principle, that a claim of this sort shall not transmit against the wrongdoer's representatives because it is not a claim for real damage but only for *solatium*. The law recognises a claim for *solatium*, and I do not see why the death of the delinquent should deprive a party of that claim any more than of a claim for actual loss sustained. I am unable to see a sufficient legal distinction between the two

and I therefore concur with the Lord Ordinary in holding that this action lies against the representatives of Alexander Stool.

**LORD MURE**—I agree with the Lord Ordinary, and cannot see any reason why this action should not transmit against these representatives. If the facts now known to the pursuer had come to her knowledge during the period of her cohabitation with Stool, she would have had relevant grounds for an action of damages for seduction. In these circumstances the question is, whether after Stool's death this claim transmits against his representatives? It was maintained that it does not, since it is of the nature of a claim of damages for delinquency, and such a claim, it was said, does not transmit against the delinquent's representatives except where there has been liti-contestation during the life of the delinquent. I am not able to find any authority to the effect that the absence of liti-contestation is conclusive of that question. On the contrary, there are indications of opinion in the cases of *Morrison*, May 25, 1809, F.C., and *M'Naughton*, February 17, 1809, F.C., that liti-contestation is not absolutely necessary. The rule of law as laid down by Erskine in iii. 1, 15, appears to me quite distinctly to reach a case of this sort. Mr Erskine there says—"If the delinquent should die, an action of damages lies against his heirs and representatives, for though penalties are not transmissible against a delinquent's heirs, yet as the reparation of damages is grounded on an obligation merely civil, the heir of the person obliged must be subjected to it."

On the whole matter I cannot come to the conclusion that such an action does not transmit. It is a strange story no doubt, and the pursuer will find it difficult to make out her claim for damages, but I concur with the Lord Ordinary in the result at which he has arrived.

**LORD SHAND**—I regret that I am unable to agree with the result at which your Lordships have arrived, and if the decision of this case rested with me I should hold that an action based on such averments was not relevant against executors.

The circumstances of the case are most extraordinary, but on a consideration of them it is clear that the pursuer is not able to aver real damage, and I think your Lordships—or at least your Lordship in the chair—are of that opinion. The female pursuer having been married a number of years ago, lived and cohabited with her supposed first husband until he left for Calcutta, where he met his death in the year 1869. She had no reason to doubt that he was her husband, and she had the *status* of his wife from the time of the ceremony of marriage down to the date of her supposed husband's death. She received a part of his pay each year, and at his death was paid the balance which remained after realising his effects and paying his debts. During the marriage she received everything she expected, and sixteen years have elapsed since the death of her supposed husband; three years after his death she married again, and has been married for thirteen years.

As far as can be seen, no such claim as that now advanced would ever have been made had

the pursuer not accidentally learned that Stool had succeeded to a small estate through the death of his grandfather, and it was in consequence of that circumstance that the pursuer and her husband (who married her thirteen years ago) have brought the present action.

The averment which she makes about herself is in these terms—[*His Lordship here read condescence 8 quoted above in the opinion of the Lord President*]. Now, it cannot be said that the female pursuer has suffered any damage to her prospects, nor is there any reasonable prospect of her being injured in her character and reputation, for three years after the death of Stool she married her present husband, and she has lived with him as a married person ever since.

In that state of matters all that really remains in this case is an action of damages for injury to feelings, and the pursuer alleges that she has so suffered. Now, I am humbly of opinion that an action will not lie against executors which is based entirely on an averment of injury to feelings caused by the predecessor of the executor.

No real damage whatever has been disclosed by the pursuer in her averments, only some vague averments have been made by her that she has sustained great and irreparable injury to her feelings. I cannot find, although I have searched most carefully, any example of an action of this kind being sustained before the present case.

In such cases hitherto it has been necessary for the pursuer to instruct patrimonial loss, and when the action has been sustained against executors the measure of the damage has been limited to the actual loss sustained.

It has been argued that this was a debt which became due to the female pursuer. The claim for *solatium* is no doubt a debt which can be made good against the wrongdoer, but it is a claim which ought, I think, to be considered as personal, and as it will not transmit to the executor of the person making the claim, so it ought not to transmit against the executor of the person who is alleged to have caused the injury.

**LORD ADAM**—This is no doubt a very peculiar case, and one which it is very unlikely will occur again. I agree with your Lordships in thinking that there is no trace of real injury to the pursuer as the result of what has occurred, and that the action therefore is one for *solatium* in respect of injury to feelings. If Stool had been alive there can be no doubt that the action would have been good against him, but it is maintained that a claim arising *ex delicto* does not transmit against the representatives of the wrongdoer.

Without again examining the authorities referred to by your Lordship, they result in this, I think, that when an injury is done it must be repaired. In this country damages are allowed in respect of *solatium*, which is nothing more or less than a civil debt. I can see no difference between one kind of civil debt and another, nor can I see why one kind of civil debt should transmit against heirs while another should not.

This action would undoubtedly have been good if it had been directed against Stool in his lifetime, and I can see no reason why the claim should not transmit against his representatives.

The Court adhered.

Counsel for Pursuers—Baxter. Agent—William Officer, S.S.C.

Counsel for Defenders—G. Wardlaw Burnet. Agent—George Andrew, S.S.C.

Wednesday, July 15.

## SECOND DIVISION.

[Sheriff-Substitute of  
Lanarkshire.

MACKINNON (GILMOUR'S TRUSTEE) v. THE  
GLASGOW AND SOUTH-WESTERN RAIL-  
WAY COMPANY.

*Agreements and Contracts—Railway—Agreement  
to Carry Goods at Stipulated Rates—Construc-  
tion.*

A railway company entered into an agreement with certain coalmasters to carry all their traffic of specified descriptions on the company's line to or from their collieries at a certain specified rate per ton per mile for every distance over six miles. It was stipulated in the agreement that in the event of the company charging to any trader, who was not a party to the agreement, for distances above six miles, for the same descriptions of traffic, to any place, lower rates than those stipulated in the agreement, then the company should give to the coalmasters who were parties to the agreement a corresponding reduction in the rates payable by them for their traffic of a similar description to such place, so long as such lower rates were charged against any other trader. The company carried the traffic of a trader not a party to the agreement, for a distance above six miles, at a rate which was not less in actual amount than the rate charged against the parties to the agreement, but which was less per ton per mile in proportion to the respective distances carried, per ton per mile, than the rates stipulated in the agreement. *Held* that the coalmasters who were parties to the agreement were entitled to a reduction in the rates paid by them corresponding to the lower rate charged to such trader.

This case related to the construction of certain clauses of an agreement entered into in May 1875 between the Glasgow and South-Western Railway Company of the first part (therein designated the first party), and Allan Gilmour & Company, coalmasters at Portland and Hurlford Collieries, and other coalmasters and brick manufacturers in Ayrshire (therein designated the second party). The following were the provisions of the agreement which related to the present case:—*First*, That the first party should from 1st January 1874 be bound to carry all coal, dross, and common and fire-clay bricks and tiles as in another agreement between the first party and the Eglinton Iron Company, sent by the party of the second part over any of the first party's railways from or to the second parties' collieries and brickworks. "*Second*, The second party respectively shall, subject to article eleventh hereof, as from the said date, pay to the first party, for and in respect of the traffic of the

second party before mentioned, the charges following, viz.—For and in respect of . . . coal and dross passing along the said railways, the second party shall pay to the first party the charges specified in Schedule B hereto annexed. *Ninth*, It is hereby provided and agreed that, in the event of the first party charging to any other trader, for distances above six miles, for the said descriptions of traffic to any station or place, lower rates than those stipulated in this agreement to be paid by the second party, then and in that event the first party shall give to the second party a corresponding reduction in the rates payable by them for their traffic of a similar description to such station or place, while and so long as such lower rates are charged against such other trader. *Eleventh*, It is specially agreed that, notwithstanding the rates or charges before specified, the first party shall be entitled to charge, and the second party shall be bound to pay, rates or charges similar to those which may for the time being be charged to and paid by the Eglinton Iron Company in respect of the carriage of common and fire-clay bricks and tiles, and coal and dross for land sale and shipment, not exceeding the scale of rates and charges paid by the second party immediately preceding the first day of January Eighteen hundred and seventy-four, and in the event of any consideration being paid, given, or allowed by the first party to the Eglinton Iron Company for an increase in the charges payable by them for the carriage of the said traffic, a corresponding consideration shall be paid, given, or allowed by the first party to the second party."

Schedule B, referred to in clause 2, specified the rates for coal and dross as follows:—"When carried six miles or under, the sum of sevenpence halfpenny per ton. When carried any distance above six miles, and not exceeding sixteen miles, the sum of one penny farthing per ton per mile. When carried any distance above sixteen miles, and not exceeding twenty-six miles, the preceding rate for the first sixteen miles, and for every mile thereafter the sum of three-farthings per ton per mile. When carried any distance exceeding twenty-six miles, the preceding rate for the first twenty-six miles, and for every mile, thereafter the sum of one halfpenny per ton per mile." . . .

In December 1884 William Mackinnon, C.A., as trustee under a trust-deed for behoof of creditors, executed by Allan Gilmour of Allan Gilmour & Co. above mentioned, raised the present action in the Sheriff Court of Lanarkshire at Kilmarnock against the Glasgow and South-Western Railway Co. He prayed the Court to find and declare that under the terms of the above-recited agreement between the railway company and the various coalmasters, "in the event of the defenders charging to any other trader than those who are parties to said agreement, for distances above six miles for the descriptions of traffic therein specified, namely, for coal dross and common and fire-clay bricks and tiles, to any station or place, lower rates than those stipulated by said agreement to be paid by the second parties thereto," namely, the rates specified in Schedules A and B, "then in that event the defenders are bound to give to the pursuer, as trustee aforesaid, and his successors in office, as one of the second parties to said agreement, a