

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;