

COURT OF SESSION.

Saturday, May 27.

FIRST DIVISION.

[Lord Kinnear, Ordinary.

THORBURN v. THE CALEDONIAN RAILWAY COMPANY.

Process—Court of Session Act 1850 (13 and 14 Vict. cap. 36), sec. 40—Fixing Place and Date of Jury Trial

In an action of damages arising out of a railway accident, issues were adjusted before the Lord Ordinary on the 27th of May. His Lordship appointed the trial to take place before himself on a day which he named. The pursuer objected to the time and place fixed by the Lord Ordinary, who thereupon, in terms of the 40th section of the Court of Session Act of 1850, verbally reported the case to their Lordships of the First Division. In support of his objections to the time and place fixed by the Lord Ordinary, the pursuer stated that but for wilful delay on the part of the defender the case would have been ready for trial before the end of the Winter Session, at which time he would have been prepared to have moved the Court to fix the approaching Spring Circuit Court to be held in Glasgow as a suitable time and place for the trial. He further argued that as the locus of the accident was not far from Glasgow, in the neighbourhood of which the pursuer and the majority of the witnesses resided, their Lordships should fix Glasgow as the place, and the Circuit Court to be held there in September as the time, for the trial of the cause. The defender objected, and urged that as another claim arising out of the same accident (Pennilee) was to be tried on the day preceding that which the Lord Ordinary had fixed for the trial of this cause, and as the defender had all his evidence prepared, it would impose great hardship and expense upon him if the trial of this case was postponed till autumn, and further, that it was in the true interest of both parties that the two cases should be tried consecutively. Their Lordships found that no sufficient cause had been shown for altering the day fixed by the Lord Ordinary.

Counsel for Pursuer—M'Kechnie. Agents—Duncan, Archibald, & Cuninghame, W.S.

Counsel for Defender—Johnstone. Agents—Hope, Mann, & Kirk, W.S.

Saturday, May 27.

OUTER HOUSE.

[Lord Kinnear.

WOOD v. WOOD.

Husband and Wife—Aliment—Process—Proof.

In an action for aliment at the instance of a wife deserted by her husband it is unnecessary to lead evidence if the husband fails to appear.

This was an action for aliment brought by Mrs

Janet Wood against her husband, who had deserted her and gone to live apart from her about a year after marriage.

The pursuer claimed that as she had shown a prima facie case for aliment, and the husband had not lodged defences, she was entitled to decree in terms of her summons, as in an undefended action, without proof of her averments.

Pursuer's authorities—*Coutts v. Coutts*, June 8, 1866, 4 Macph. 802; *Williamson v. Williamson*, January 27, 1860, 22 D. 599; *Crombie v. Crombie*, May 19, 1868, 6 Macph. 776; *Arthur v. Gourlay*, March 9, 1769, 2 Pat. App. 184; *Fraser on Husband and Wife*, i. 841.

The Lord Ordinary issued the following interlocutor:—"The Lord Ordinary finds, declares, and decerns in absence against the defender, conform to the first and second conclusions of the libel, but under deductions of the payments mentioned and referred to in the summons, with expenses.

Counsel for Pursuer—Salvesen. Agents—Miller & Murray, S.S.C.

Wednesday, May 31.

FIRST DIVISION.

SMITH AND OTHERS v. SMITH OR FERGUSON.

Process—Proving of the Tenor—Presumption—Husband and Wife—Marriage-Contract—Casus Amissionis—Special Casus Amissionis necessary where Lost Document may have been Lawfully Destroyed—Whether Marriage-Contract may ever be Lawfully Destroyed.

In an action of proving the tenor it was alleged that a husband and wife had entered into an antenuptial marriage-contract by which the husband bound himself to provide the wife, in the event of his predecease, in a liferent of his household furniture and an annuity of £200 a-year, to be restricted to £100 a-year in the event of her second marriage, in which event also the liferent of the furniture was to be forfeited. In consideration of this annuity the wife discharged her legal rights and bound herself to aliment and educate, if necessary, out of her annuity the children of a previous marriage of the husband, as well as any children of the contemplated marriage. After the marriage the husband's means largely increased, and he expressed a wish to make a better provision for his wife. He died intestate, and the contract of marriage which was said to have been in his possession was nowhere to be found. In a proving of its tenor at the instance of the children of the marriage, and the husband's children by his first marriage, in which the widow denied that it had ever been executed—held, after a proof (diss. Lord Deas), that assuming it to have been duly executed, it was rather of the nature of a unilateral deed by which the husband was to benefit, than of a mutual deed; that the husband was therefore entitled to destroy it in order that his widow might take her legal rights; and that therefore the pursuers were bound to aver and

prove a special *casus amissionis*, such as fire or accident, in order to exclude the presumption that it had been designedly destroyed by the husband.

On 22d September 1868 Mr William Black Ferguson was married at Stonehaven to Miss Helen Louisa Smith. Mr Ferguson was then a widower with five daughters. Of his second marriage there were born four daughters. His means at the time of his second marriage were somewhat narrow, but they increased considerably thereafter, and at his death, survived by his wife and nine daughters, in September 1881, his personal estate amounted to between £18,000 and £20,000, and his heritable estate was of the value of about £5000. He left no settlement, and his widow was decerned executrix-dative *qua* relic to him. Mr Thomas Hector Smith was appointed in November 1881 factor *loco tutoris* to three of the daughters who were still in pupillarity, and *curator bonis* to another who was in minority. In December 1881 he, as such factor and curator for the children of the second marriage, together with the five daughters of the first marriage, raised this action against the widow Mrs Helen Louisa Smith or Ferguson as her husband's executrix, and as an individual, for the purpose, as set forth in their summons as amended, of having it found and declared that a marriage-contract had been entered into, and duly and validly executed by Mr Ferguson and the defender at Stonehaven on 18th September 1868, and to have the tenor of it proved to have been as follows:—"It is contracted, agreed, and matrimonially ended between the parties following, viz., William Black Ferguson, civil engineer in Aberdeen, of the first part, and Miss Helen Louisa Smith, eldest surviving daughter of Thomas Smith, merchant in Stonehaven, of the second part, in manner following: That is to say, the said parties have accepted and hereby accept of each other for lawful spouses, and promise to solemnise their marriage with all convenient speed: In contemplation of which marriage, and in consideration of the conveyance and assignation after written, the said William Black Ferguson binds and obliges himself, his heirs, executors, and successors whomsoever, without the necessity of discussing them in their order, to content and pay to the said Helen Louisa Smith if she shall survive him, for her aliment, a free liferent annuity of £200 sterling, and that at Whitsunday and Martinmas yearly, by equal portions, beginning the first term's payment thereof at the first term of Whitsunday or Martinmas that shall happen next after the death of the said William Black Ferguson, for the half-year succeeding, and the next term's payment thereof at the first term of Whitsunday or Martinmas thereafter for the half-year succeeding, and so forth, half-yearly, termly, and continually thereafter, with a fifth part more of each of the said termly payments of liquidate penalty in case of failure, and the interest of each of the said termly payments, at the rate of £5 per centum per annum from and after the term of payment thereof during not-payment: Declaring hereby, in the event of the said William Black Ferguson not leaving at the time of his death sufficient funds and property to provide for the foresaid annuity, and also to provide for the suitable maintenance and education of the

children of his former marriage, as well as of any child or children who may be procreated of the present intended marriage, that the said Helen Louisa Smith shall be bound and obliged to employ the foresaid annuity, or any part of it, which the said William Black Ferguson's estate may at the time of his death be sufficient to yield (if such estate shall not be sufficient to yield the whole of it), not only in supporting herself, but also in alimending and educating the children of his said former marriage, and of the present intended marriage, until the said children shall attain majority or be married; and the said William Black Ferguson further hereby binds and obliges himself to give the said Helen Louisa Smith, if she shall survive him, the liferent use and enjoyment of the whole household furniture and plenishing, including silver plate, china, books, and pictures, which shall belong to him at the time of his death, as also to make payment to her within three months after the day of his death, if she shall survive him, of the sum of £50 as an allowance for her mournings, and to make payment to her at the rate of £200 per annum for the time that shall have to run from the day of his death to the term of Whitsunday or Martinmas thereafter, whichever shall first arrive, in name of aliment, and as the expense of maintaining the family, and for house-rent and servants' wages to that term, which aliment shall be paid to her at the same time with the allowance above provided for mournings, which sums the said Helen Louisa Smith hereby accepts in full of all she can ask in name of mournings, or for alimending and supporting herself and the family to the first term after husband's death: Declaring hereby, that if the said Helen Louisa Smith shall enter into a second marriage, then and in that event her liferent right and use of the said household furniture and plenishing, plate, china, books, and pictures, shall, from the date of such marriage, cease and determine, and the said annuity of £200 provided to her shall be restricted to the sum of £100 sterling yearly, payable at the terms and with corresponding interest and penalty as aforesaid, which provisions above written, conceived in favour of the said Helen Louisa Smith, she hereby accepts in full satisfaction of all terce of lands, legal share of moveables, and every other thing that she *jure relicte* or otherwise could ask, claim, or demand from the said William Black Ferguson, or his heirs, executors, and representatives, by and through his death if she shall survive him: For which causes, and on the other part, the said Helen Louisa Smith hereby assigns, disposes, conveys, and makes over to the said William Black Ferguson, his heirs and assignees, all and sundry lands and heritages, goods, gear, debts, and sums of money, and generally the whole property, heritable and moveable, now belonging or resting and owing to her, or that shall in any way pertain and be owing to her during the subsistence of the said marriage, surrogating and substituting the said William Black Ferguson and his foresaids in her full right and place of the premises, with the same powers in every respect as she herself enjoyed before granting hereof, excepting always from this conveyance the foresaid provisions which the said William Black Ferguson has by this contract made in her favour, and any other provision which he may hereafter think proper to