

Tuesday, December 8.

FIRST DIVISION.

[Lord Fraser, Ordinary.

CLARK v. YOUNG AND OTHERS.

Process—Proof—Jury Trial—Reduction—Fraud.

Three of the next-of-kin of a testatrix raised separate actions of reduction of her trust-deed on the grounds of facility and circumvention, and the Court (*rev.* the Lord Ordinary, who had appointed a proof) ordered issues, *holding* that there were no such special circumstances as to warrant a departure from the ordinary mode of trying such cases.

The deceased Mrs Jane Purvis or Taylor, widow of George Taylor, mahogany merchant, London, died at Glasgow on or about the 30th August 1884 in the house of Mr and Mrs Hollis, who were defenders in this action. Mrs Taylor left a deed of settlement, executed on the night on which she died. It was not signed by herself, but by a notary public, and was prepared by a writer in Glasgow.

The deed was a trust-disposition and settlement, the trustees being John Young and others, including Mrs Hollis. Mrs Hollis also received under the deed £2400 and the whole of the residue of Mrs Taylor's estate.

Three actions of reduction of the said trust-deed and settlement were raised by Walter Clark, William Clark, and Robert Clark and others, who were among the next-of-kin of the deceased, all sons of Mrs Jessie Purvis or Clark, who was a sister of the testatrix.

All the pursuers sought to reduce the alleged settlement of Mrs Taylor. Walter Clark and Robert Clark also sought to reduce assignations in favour of the defenders whereby (pursuers) bore to assign to the defenders their right in Mrs Taylor's succession.

The pursuers averred that at the time when Mrs Taylor was alleged to have executed the deed she was quite incapable of managing or of giving directions for the management of her affairs, or at all events was in such a state as to be liable to circumvention, and had in fact been circumvented; that it was not her deed, but had been fraudulently obtained from her. It was also averred that the assignations sought to be reduced had been fraudulently obtained.

At the closing of the records the Lord Ordinary refused a motion by the pursuers for an order for the adjustment of issues, with a view to the causes being tried by jury, and appointed a proof in the cause to proceed on a day to be fixed.

The pursuers reclaimed, and asked the Court to appoint the parties to lodge issues, on the ground that this was the ordinary mode of trying cases of reduction on the ground of facility and circumvention.

Authorities—*Munro v. Paterson and Strain*, February 14, 1874, 1 R. 522; *Crichton v. Crichton*, March 3, 1874, 1 R. 688; *M'Laurin v. Stafford*, December 17, 1875, 3 R. 265.

At advising—

LORD PRESIDENT—There can be no doubt as to the ordinary rule applicable in cases of reduction of settlements on the ground of facility and cir-

cumvention, namely, that such cases are sent to a jury. The only additional element that we have here is the reduction of this assignation, and the question comes to be, whether that introduces any new element sufficient to warrant us in departing from the ordinary rule. I cannot see any specialty in the circumstances here, and though the Lord Ordinary has appointed the case to be tried before himself without a jury, he has not given us any reason for following this course. Although I do not dispute that the Court may in special circumstances sometimes see fit to act otherwise, yet I can see nothing in the present case to warrant our departing from the ordinary rule.

LORD MURE concurred.

LORD SHAND—I am very unwilling to interfere with the discretion of the Lord Ordinary in any question of procedure, but what is asked here by the reclaimer is that the ordinary rule in such cases should be followed, and the question determined by a jury and issues in the usual way. Had I been sitting in the Outer House, I should certainly have ordered issues in such a case, and I therefore quite concur in the course now proposed by your Lordship.

LORD ADAM—I am of the same opinion.

The Court recalled the Lord Ordinary's interlocutor, remitted to him to adjust issues, and appointed the three cases to be tried before one jury.

Counsel for Pursuers—M'Kechnie—Shaw. Agents—Cairns, M'Intosh, & Morton, W.S.

Counsel for Defenders—Jameson. Agents—Cumming & Duff, S.S.C.

Tuesday, December 8.

FIRST DIVISION.

[Lord Fraser, Ordinary.

MILNE v. MILNE, *et e contra*.

Husband and Wife—Married Women's Property Act 1881 (44 and 45 Vict. cap. 21).

Held that the daily wages earned by a married woman during a portion of the year in her trade of fishcuring did not constitute separate "estate" in the sense of the Act.

Husband and Wife—Interim Award of Expenses—Married Women's Property Acts 1877 and 1881.

Held that the Married Women's Property Acts have not made any alteration on the ordinary rule that when a married woman has no separate estate she is entitled in a litigation with her husband to an interim award of expenses. Therefore where a husband sought to divorce his wife, who had no means except what she earned as daily wages, *held* that she was entitled to a sum to enable her to defend herself before the Lord Ordinary.

Section 3, sub-section 2, of the Married Women's Property Act 1881 provides that in the case of

marriages which have taken place before the passing of the Act, "the *jus mariti* and right of administration shall be excluded . . . from all estate . . . to which the wife may acquire right after the passing of the Act."

In July 1885 John Milne, fish-dealer, Aberdeen, raised an action of divorce for adultery against his wife Mrs Jessie Fraser or Milne, calling a man named Charles William Ballard as co-defender.

On September 1885 Mrs Milne raised a counter-action of divorce for adultery against Milne. In her condescendence she averred that her earnings were barely sufficient to keep her in life. In his answers he averred that since she left him she had been employed at high wages as a herring curer, in which trade she was very expert. He averred that she had saved not less than £15 during the herring season, and that she had since then been earning 5s. to 15s. a-day.

The Lord Ordinary conjoined the actions, and in the conjoined actions allowed a proof.

Thereafter on 19th November counsel for Mrs Milne moved the Lord Ordinary for an interim award of expenses.

The Lord Ordinary refused the motion, and reposed leave to reclaim.

This note of his Lordship's ground of refusal was laid before the Inner House:—"Lord Fraser said he would not give an award of expenses in this case, and that he refused it upon two grounds. He thought that the foundation on which the practice of giving expenses to a wife rested had been altogether cut away by the Married Women's Property Acts. The practice rested upon this principle—that the wife had no personal estate. It was all swept away by the husband's *jus mariti*. No doubt, before the passing of the Married Women's Property Acts a wife could hold separate personal estate, but only in virtue of a deed by which the husband's *jus mariti* was renounced or excluded. In such a case she was bound to conduct a litigation with her husband like any other litigant, that is, at her own expense. The second ground for refusing expenses in the present case was, that although it was denied that the wife had means, there was a very specific statement of her earnings; and it should have been met by a distinct statement of these earnings, and not by a mere denial. It was clear from the statutes that if a wife had means she was bound to litigate at her own cost in every action."

On same date Mrs Milne's agent wrote as follows to the agent of the pursuer:—"Dear Sir, —I beg to intimate that in consequence of the Lord Ordinary's decision to-day, and his refusal to allow an appeal, Mrs Milne, who is utterly without funds, does not intend to appear further in either of the actions.—Yours, &c."

On 21st November proof was led in the husband's action, the wife not appearing. The Lord Ordinary pronounced decree of divorce against the wife, granting expenses to the husband against Charles William Ballard, the co-defender: "And having called the action at instance of the said Jessie Fraser or Milne against the said John Milne, in respect of no appearance for the said Jessie Fraser or Milne, assoilzies the defender John Milne from the conclusions of the said action."

The defender Mrs Milne reclaimed, and argued that the Lord Ordinary was wrong in refusing her an interim award of expenses. The Married Women's Property Act only took effect when a woman had separate estate. It protected that estate, but it did not confer separate estate. Here all the wife had was her earnings, which were precarious. Earnings were not separate estate in the sense of the Act. The defender did not abandon her action; she merely stood aside from want of means to defend. She was entitled in the circumstances to be reposed, as she had no separate estate.

Authorities—Fraser, Husband and Wife, vol. ii. pp. 1130 and 1231; Married Women's Property Acts, 1877 (40 and 41 Vict. cap. 29), sec. 3, and 1881 (44 and 45 Vict. cap. 21), secs. 1 and 3; *Dickson v. Dickson*, February 17, 1841, 3 D. 559; *Baxter v. Baxter*, May 28, 1845, 7 D. 639; *M'Gregor v. M'Gregor*, July 8, 1841, 3 D. 1191; *Gow v. Gow*, February 21, 1855, 17 D. 471.

Replied for respondent—The defender abandoned her action by not appearing at the proof. The present application should be refused because it was incompetent, this not being a decree in absence; and further, the Lord Ordinary had refused this application on the merits, and the awarding of interim expenses was a matter entirely in the hands of the Lord Ordinary. Under the Married Women's Property Acts the parties here were independent persons, and the *onus* which formerly lay upon the husband in respect of his *jus mariti* was now by the operation of these statutes discharged. The wife here had separate estate, her own earnings, and was able to pay her own expenses.

Authorities—*Tyre v. Ormiston*, Hume's Decisions, p. 7; *Stewart v. Stewart*, February 27, 1863, 1 Macph. 449.

At advising—

LORD PRESIDENT—In this case there were counter actions of divorce, the first of which was by the husband against his wife, while the other was by the wife against her husband. The husband's was the leading action. The Lord Ordinary conjoined the two actions and allowed a proof, and it was after that interlocutor was pronounced that the wife's counsel asked the Lord Ordinary for a sum of expenses to enable her to prepare her case.

When this motion was made there does not appear to have been any order pronounced upon it, but the Lord Ordinary recorded in a note his reasons for not giving any award. The wife thereupon represented that she was unable to meet the cost of bringing any witnesses to the trial or even of being herself present at the proof. The result of this is the interlocutor now reclaimed against. The Lord Ordinary in the action by the husband against his wife took the proof adduced by the pursuer, the defender not appearing, and found the defender guilty of adultery; and in the counter action he assoilzied the husband in respect of no appearance for the wife. The wife now reclaims; and what she asks virtually is that she be reposed, because as she alleges she gave a good and sufficient reason for her non-attendance, and something ought to have been done to have enabled her to conduct her case.

If the views stated by the Lord Ordinary in his

note as to expenses be correct, and if we are to adhere to these, then the wife has no good ground for asking to be reponed. But I am not prepared to agree with the Lord Ordinary in the view which he takes as to the effect of the Married Women's Property Acts, or to hold that the principle upon which expenses were given to a wife in such cases was in any way affected by these Acts. The Lord Ordinary says that the practice of allowing a married woman expenses rested upon this principle, that by the operation of the husband's *jus mariti* the wife had no personal estate. Now, that is quite true, and it is the foundation of the rule which has hitherto been acted upon. But it must be kept in mind that these Acts had not the effect of bestowing upon any married woman separate estate. All that they did was to protect any estate of which she might be possessed. While therefore the effect of these Acts is to extinguish the *jus mariti* as regards the wife's estate, the question will always remain whether the wife has any separate estate to be protected.

The rule is just as it was before these Acts were passed. If she has separate estate she is bound to conduct a litigation with her husband at her own private expense, while if she has no separate estate then she is exactly in the position a wife was in prior to the passing of these Acts, and she is entitled to an award of expenses.

The question then comes to be, whether there is here any allegation that the wife here has separate estate? I do not think that there is. She may by her industry earn wages sufficient to feed and clothe herself, but that is not separate estate in the sense of these Acts. The rule remains as it was before this Act was passed.

The Lord Ordinary then ought not, I think, to have refused the wife an award of expenses, unless he came to be of opinion that the husband had not the money wherewith to give her it, in which case he should have ordained the husband to provide the small sum sufficient to let both himself and his wife get put upon the poor's roll; and that is the course which I should suggest to your Lordships that we ought now to adopt. I think, then, that we ought to repon the defender, recall the interlocutor of the Lord Ordinary, and sist process *in hoc statu* in order to allow the husband to make such an application.

LORD MURE concurred.

LORD SHAND—I am of the same opinion, and for the reasons stated by your Lordship. I think that this case ought to be disposed of without reference to the Married Women's Property Act at all. I cannot read the letter by the wife's agent of 19th November 1885 [quoted *supra*] as an abandonment of the action by the wife, and in so treating it I think the Lord Ordinary went too far. The same rule, I think, prevails now as existed prior to the passing of these Acts, namely, that if the wife has separate estate she must litigate with her husband at her own expense. In the present case it would appear that the husband has no money wherewith to pay even if the wife did get a decree, and the wife does not aver that the husband has the means to pay for her defence. I think, therefore, that the course suggested by your Lordship ought in the circumstances to be adopted.

LORD ADAM—When first I read the judgment of the Lord Ordinary it struck me that it was of a very sweeping character. Usually the wife has no separate estate, and except among the working classes she has not the aptitude to earn a livelihood.

The effect of such a decision as this would be that a husband might bring an action such as this against his wife, and then turn her out of doors and let her defend herself as best she could. That certainly was not the intention of these statutes, which were to aid married women and to protect their separate estate.

I think that all actions of divorce should be defended so as to supply the Court with as much information as possible before decree is pronounced, and as I do not think that the effect of these Acts was to make any change as to awarding expenses in actions of this kind, I concur in the opinion expressed by your Lordship.

The Court recalled the interlocutor of the Lord Ordinary, and sisted procedure *in hoc statu* to allow the parties an opportunity of applying for the admission to the poor's roll.

Counsel for Milne—Lang—G. W. Burnet.
Agent—Thomas Carmichael, S.S.C.

Counsel for Mrs Milne—Rhind. Agent—J. D. Macaulay, S.S.C.

Wednesday, December 9.

SECOND DIVISION.

[Sheriff of Perthshire.

MITCHELL v. PATULLO.

Reparation—Employers Liability Act 1880 (43 and 44 Vict. cap. 42)—Negligence—Condition of Employer's Premises—Misadventure.

A master is not bound to have the most new and excellent appliances, but only to use reasonable precautions. Therefore where a farm-servant claimed damages in respect that he had been injured by the blowing of a shed door, and that this would not have happened if it had been of a different construction or fastened with a sneck instead of having something put against it to hold it—held that the master was not liable.

John Mitchell, labourer, Blairgowrie, raised this action of damages for £150 as damages at common law and under the Employers Liability Act 1880 against James Patullo, Esquire, of Persey, in respect of personal injuries sustained by him while in the latter's service, under the following circumstances:—On 28th October 1884 the pursuer, who was "orraman" on the defender's farm, was assisting to unload a cart of turnips in a turnip shed. He took the tail-board of a cart which was backed into the shed. The defender's grievance was present at the time. The door of the shed was a folding one, and was not supplied with catches and staples to fasten it back when opened. The custom was, on a windy day such as that of the accident, to put something, such as a stone, against it to hold it, and on this occasion it was fastened back with a shovel by the driver of the cart, William Gall, who was also in the