policy on which the agent's right appears to be founded, viz., that legal assistance might be brought within the reach of poor litigants, being also questioned.

"I think it established by these cases that an agent's right to take up an action in order to recover expenses is admittedly only (1) when his client has obtained a decree for expenses, or (2) judgment necessarily leading to such a decree, or (3) where there has been collusion between the parties in order to defeat his claim. This case certainly does not fall under the first or second cases; although if the pursuer had accepted the tender of £50, I think that the principle of the second case might have applied because the right of the party to expenses would then have been certain. Neither do I think his claim can be maintained on the ground of collusion. It is by no means easy to say in what cases, if indeed in any, an agent's claim can be supported on this ground at all. I am disposed to think that it would not be allowed on that ground if the action were settled near the commencement of it. But I think that in this case there are no relevant averments of collusion. There is really nothing averred but the settlement. No doubt when a defender who had made a tender of £50 with expenses manages to induce a pursuer to accept £20 without expenses, some curiosity and suspicion are aroused; but the suspicion is not that the pursuer's agent is the person who has been overreached. It would have looked more like that had the payment made by the defender been £50 or a little above it. Then it might have been said that the only reason for settling the case out of Court was to defeat the agent's claim. But when a defender who has tendered £50 is informed by a pursuer that he is content with £20, it stands to reason that whether the pursuer's astounding moderation has been brought about fairly or not, the defender will accept the offer at once and will not allow any regard for the pursuer's agent to stand in his way for a moment. Of course in saying this I am assuming that the settlement was what the receipt expresses. Mr Lee does not aver the contrary. In truth there is nothing in this case pointing to collusion except the extrajudicial settlement itself, and in that respect the case is really substantially the same as *Murray* v. *Kidd*, or *Macqueen* v. *Hay*.

"Further, in the cases in which an agent is allowed to sue for his expenses because of the collusion to defeat his right, his claim must of necessity be founded on an implied assignation of the right of his client. His right to recover expenses cannot be higher than his client's right—consequently he cannot in such a case have any right unless he can show that the action would if carried not result in a decree for expenses in favour of his client. That could not be ascertained without carrying on the action. But that Mr Lee does not offer or desire to do; and that I imagine an agent will not be entitled to do at the commencement of an action. In this case I of course know nothing of the facts, and can form no idea about the result. And as in the present state of the process there is no ground for holding the pursuer entitled to expenses, there can be no good ground for decerning for them in name of his agent."

Counsel for the Pursuer—A. M. Anderson. Agent—J. B. W. Lee, S.S.C.

Counsel for the Defender — Hunter. Agents—Carmichael & Miller, W.S.

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*Thursday, March* 10.

## OUTER HOUSE.

[Lord Pearson.

## DEMPSTER'S TRUSTEES *v.* DEMPSTER.

*Trust—Marriage-Contract—Apportionment of Capital and Income—Rents of Heritable Subjects of which Trustees in Possession under Bond.*

A wife who had conveyed her whole estate, including *acquirenda*, to marriage-contract trustees, became entitled to a one-seventh share of a certain trust-estate. Part of that estate consisted of heritable property which was not realisable, and the trustees accordingly entered into possession and paid to the marriage-contract trustees the one-seventh share of the rents and profits arising therefrom. In estimating the amount of such rents and profits which ought to be allocated to capital and income respectively, *held* that a sum should be ascertained, which, put out at a reasonable rate of interest at the death of the testator, would, with accumulation of interest, have equalled the amount ultimately realised, together with the rents and profits received, and that the sum so ascertained should be treated as capital and the residue as income. *Held* further, that when a liferent to the widow of the testator was provided, the sum should be ascertained as if invested at the date of the death of the liferentrix, and not at that of the testator.

By antenuptial contract of marriage Mrs Jessie Louisa Hickey or Dempster conveyed to trustees all and sundry lands and heritages, goods, gear, debts, sums of money, and generally the whole property, heritable as well as moveable, then belonging to her, or that should pertain to her during the subsistence of her marriage. One of the purposes of the trust was for payment to her of the free interest or annual proceeds thereof during all the days of her life. Part of the property thus conveyed consisted of Mrs Dempster's interest, to the extent of one-seventh, in the trust-disposition and settlement of the late Dr George Playfair. Dr Playfair died in 1846, and his widow, who had a liferent of his estate, in 1862. Part of this trust-estate consisted of real property in Calcutta,

which Dr Playfair's trustees were unable to sell. They, however, entered into possession of the subjects and drew the rents, a seventh part of which they remitted to Mrs Dempster's marriage-contract trustees, or the share falling to her. In their accounts the marriage-contract trustees treated these payments as capital. The property was ultimately sold, and the amount realised divided among the beneficiaries.

In 1897 the trustees under Mrs Dempster's marriage-contract presented a petition for authority to resign, for exoneration and discharge, and for appointment of a judicial factor. On the petition being remitted to the Accountant of Court he expressed doubts as to whether the amounts received from Dr Playfair's trustees prior to the property held by them had been rightly treated as capital of the marriage-contract trust. A minute was accordingly lodged for Mrs Dempster, praying that the accounts be re-stated.

On 10th March 1898 the Lord Ordinary (PEARSON) pronounced the following interlocutor:—"Finds that the share (1) of the rents and revenue of the Calcutta property, (2) of the price obtained for said property when sold, and (3) of the other assets of Dr Playfair's estate remaining unrealised at 13th April 1862, which was from time to time received by Captain and Mrs Dempster's marriage-contract trustees from Dr Playfair's trustees, is to be allocated between capital and income in the accounts of the said marriage-contract trustees as follows, namely, by ascertaining the respective sums which put out at interest at the rate of four per centum per annum on 13th April 1862, being the date of Mrs Playfair's death, and accumulating at compound interest at that rate with yearly rests, under deduction of income-tax, would with the accumulations of interest have produced at the respective dates of receipt the amounts actually received by the said marriage-contract trustees; and that the aggregate of the sums so ascertained is to be treated as capital of the marriage trust, and that the remainder of the sums received as above mentioned is to be treated as income."

"*Opinion.*—This question arises in proceedings for the discharge of the trustees under the antenuptial marriage-contract of Captain and Mrs Dempster.

"By that contract, dated in 1863, Mrs Dempster conveyed to the trustees the whole property, heritable and moveable, then belonging or resting-owing to her during the marriage, to be held by them for payment of the interest to herself for life, and afterwards to her husband; and on the death of the survivor the estate was to be made over to the children of the marriage.

"Among the property thus assigned to the trustees was Mrs Dempster's right of fee in one-seventh share of the residue of the estate of her grandfather Dr Playfair.

"Dr Playfair had died in 1846, leaving a will by which he conveyed his estate to trustees, directing them as soon as might be expedient after his death to convert the whole of his estate into good and available securities. The whole income was to be paid to his wife, who survived him and died in 1862, whereupon his residue became divisible. His trustees proceeded to divide the estate, excepting certain items, one of which stood in a peculiar position, and gives rise to the present question.

"Some years before his death Dr Playfair had entered into possession of certain real property in Calcutta, by virtue of a mortgage over it to which he had acquired right. This state of matters remained at his death, and was continued by his trustees. Shortly after Mrs Playfair's death in 1862, Dr Playfair's trustees attempted to realise the property; but after taking advice they decided to hold it until the lapse of a period which, according to Indian law, would fortify their title. This period expired about the year 1894, when they realised this asset and made a final distribution of Dr Playfair's residue. While the trustees were so holding the property they drew the rents and made payments therefrom to the residuary legatees from time to time on account of their shares. The payments, both interim and final, effeiring to Mrs Dempster's one-seventh share, were made to her marriage trustees, who treated them all as capital of the marriage trust, paying her only the income thence arising.

"Mrs Dempster now claims that the trustees' accounts should be re-stated, on the footing that they ought to have treated the Calcutta rents as income, and paid them over to her. She founds this contention on the alternative ground that these rents being in themselves of the nature of income did not fall within the assignation in her marriage-contract; and that even if they did, the trustees should immediately have handed them on to her as being truly income of a part of the trust fund which had not yet been realised.

"This contention appears to me to be contrary to the facts. In the first place, Mrs Dempster and her trustees had no right in or claim against the Calcutta rents as such. Their right consisted in a claim against Dr Playfair's trustees for one-seventh of the net residue. Then again, it is only in an inaccurate sense that the rents of security subjects uplifted by a mortgage in possession can be regarded as income. They are in a sense taken in lieu of interest on the debt; but they may be large enough to extinguish part or the whole of the principal debt, and the creditor in possession remains (until the requisite steps are taken) liable in an accounting. It matters little whether they are truly income or not so long as the creditor is alive, but as soon as it becomes necessary to distinguish between capital and income of his estate or of any share in it, it would be obviously erroneous to pay away the accruing rents as income.

"The true position was this. Dr Playfair's trustees postponed the realisation of this asset for the benefit of the estate under their charge and of all concerned in it. The

shares of it had vested in fee in various beneficiaries, and the trustees' duty after the death of the liferentrix was to pay them their shares from time to time as realised, irrespective of any division into capital and income, for which there was no provision in Dr Playfair's will. All the payments, both interim and final, just represented the one-seventh share of that item of the trust-estate. But when these payments reach the hands of the marriage-trustees I think I must take account of the fact that their trust-purposes make it material to inquire whether it is all capital, or whether and how much of it is truly income. Perhaps they could not have treated the payments to account otherwise than they did, subject always to rectification of the account after the final payment is made. But at all events it would not have been safe to treat them all as income.

"On the other hand, neither are they all capital. They are the proceeds of one of Dr Playfair's investments which his trustees might, if so advised, have realised at once after his death for what it would fetch. Had they done so and invested the price it would have been an income-producing subject. It does not necessarily cease to be so because in the course of judicious realisation they hold it for years. The aggregate of the sums received by the marriage-contract trustees, that is to say, the total product of the investment so far as regards their one-seventh share, must be apportioned on some fair principle between capital and income.

"I am not aware that this question has been presented for judicial decision in Scotland. But I was referred to some English cases which furnish a rule reasonable in itself, and not inconsistent with any of our authorities—*Earl of Chesterfield's Trusts*, 1883, 24 Ch. Div. 643; in *re Foster*, 1890, 45 Ch. Div. 629; in *re Hubbuck*, 1896, 1 Ch. 754. The total amount received in the realisation is treated as if it had been the product of a sum invested as at the testator's death at a reasonable rate of interest accumulated to the date or respective dates of receipt. That sum—the sum required to produce the amount in hand under those conditions—is credited to capital and the remainder to income. It may be that this rule would operate harshly in certain cases and would require to be modified; but for the average case no fairer rule occurs to me or was suggested in argument.

"It is not however applicable here in terms, for Mrs Playfair survived her husband for sixteen years and (it is supposed) received the rents from the Playfair trustees as income. The parties here do not desire to go back into that period, and unless that is done it would be obviously unfair to take the date of Dr Playfair's death as the date from which the theoretical accumulation is to run. As between the present parties, it seems fair to take the death of the liferentrix as the terminus.

"It follows from what I have said that the circumstances of this case exclude the application of the case of *Boyd's Trustees* v. *Boyd*, July 13, 1877, 4 R. 1082, and the decisions which have followed upon it."

Counsel for the Petitioners—W. L. Mackenzie. Agents—W. & F. Haldane, W.S.

Counsel for the Minuter — Grainger Stewart. Agents—Sibbald & Mackenzie, W.S.

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*Saturday, March* 19.

## OUTER HOUSE.

[Lord Stormonth Darling.

## HUNTER *v.* HUNTER.

*Husband and Wife—Divorce—Desertion—Period of Desertion—Deduction of Term of Imprisonment.*

In an action of divorce for desertion raised more than six and a half years after the commencement of the desertion, it appeared that for ten months of that time the deserting spouse had been undergoing a term of imprisonment. Neither the period prior nor that subsequent to his incarceration amounted to four years, but the two together exceeded that term.

Decree of divorce *granted.*

On 18th January 1898 Mrs Ann Bennet or Hunter raised an action of divorce against her husband on the ground of desertion.

The pursuer averred on record, and it was established at the proof, that she was married to her husband in 1886, that about March 1891 he had left her and gone to live with another woman, and that, with the exception of one occasion when she went to ask him for money, which he refused to give her, she had never seen him since. The only information she had received about him was that on 20th September 1894 he was released from Durham jail after undergoing a period of ten months' imprisonment with hard labour for embezzlement. The identity of the defender and the prisoner so released was instructed by a letter from the governor of the jail.

The Lord Ordinary having suggested a doubt whether desertion for the statutory period of four years had been proved, the pursuer argued:—It must be admitted that the period of imprisonment fell to be deducted from the time during which the husband had been in desertion, for there could be no intention to desert on the part of a spouse in confinement—Fraser's H. & W. 1213; *Young* v. *Young*, November 16, 1882, 10 R. 184. But *Young's* case was distinguishable from the present, for there in order to make up the four years the term of imprisonment had to be counted in. Here, though four years had not elapsed between the beginning of the desertion and the beginning of the imprisonment, nor yet between the defender's discharge from prison and the raising of the action, these two intervals of time added together made up a total of more than four years. The