

in which he appointed his wife his executrix and universal legatory. Now this might be misunderstood. It might be thought that everything was given to the widow, and in that case there would be no claim. But, as rightly understood, it is a testament not interfering with the legitim. The claim of the spouses was good, and that was the claim assigned in the post-nuptial contract. Mrs Alexander, I think, was the proper debtor; and the question is whether the assignation was properly intimated to her. It was not intimated by notarial instrument, but that is not surprising for two reasons—(1) because that form of intimation is uncommon; and (2) because the parties to the assignation were in immediate personal contact with Mrs Alexander—she being one of the trustees to whom the assignation by the spouses was made. It is not contended that, being one of the trust assignees, the assignation did not require to be intimated to her. Her being so was not equivalent to intimation. But what follows? She and the other trustees, by a writing on the back of the postnuptial contract, and prior to the 7th of December 1857, intimated their acceptance of the office, and on that they proceeded to discharge their duties; and in particular, in reference to the lease of the theatre, Mrs Alexander concurs in granting that lease; and why? One reason was because she was the executrix of her husband, and another reason was because she was one of the trust assignees. She had nothing to do with the heritable estate of Mr Alexander. She had with the personal estate; and it is a fair inference that, representing the moveable estate as executrix, and also acting under her fiduciary character as a trust assignee she concurred in granting that deed. It is therefore quite impossible to say that the assignation was not intimated. No doubt, if anything technical were required in intimation, difficulties might be raised, because the intimation is not direct. But there is nothing technical in the law of intimation, and there is nothing more satisfactory as an equipollent to notarial intimation than evidence that the assignation was known to the party to whom intimation ought to be made, and we have that here in what Mrs Alexander did.

The other Judges concurred.

Friday, Jan. 19.

FIRST DIVISION.

DUNCAN AND CO. v. LUMSDEN.

Expenses—Tender. Circumstances in which an averment of a legal tender held not proved.

Counsel for Pursuers—Mr Clark and Mr J. G. Smith. Agents—Messrs Murdoch, Boyd, & Henderson, W.S.

Counsel for Defender—Mr Patton and Mr Grant. Agent—Mr James Barton, S.S.C.

In this action James Duncan & Company, merchants, Leith, sued James Lumsden, builder, Cumin Place, Grange, Edinburgh, for £70 as the balance of the price of a quantity of timber sold to him in December 1863. The summons was signed on 29th June, and given in for calling on 11th July 1864. The defence was that the sum sued for and expenses had been tendered before the summons was given in for calling. This was denied by the pursuers, and the Lord Ordinary decreed for the principal sum sued for, and allowed to the defender a proof of the questions of fact contained in his 5th and 6th statements on record, and to the pursuers a conjunct probation.

These statements were as follows:—"5. The defender, on the forenoon of 11th July last, called on the pursuers' agents, Messrs Murdoch, Boyd, & Henderson, and tendered payment of the amount due under said summons, with expenses, as the same should be taxed; but the tender was declined. The defender then waited on his agent, Mr James

Barton, who wrote to the pursuers' agents in the following terms:—"Edinburgh, 11th July 1864. Gentlemen,—My client, Mr Lumsden, informs me that he called upon you this forenoon, and tendered you payment of the amount concluded for in a summons at the instance of your clients, Duncan & Company, against him, with expenses, as these should be taxed by the auditor, but that you refused the offer, and claimed certain other expenses, being those for an inhibition upon the summons, to which your clients are not entitled, and the use of which was most oppressive, as your clients are perfectly well aware that Mr Lumsden is a responsible man. Mr Lumsden will be prepared to pay the principal sum and interest here to-morrow at twelve o'clock noon, and the expenses of the summons will also then be paid, if taxation is found to be unnecessary. Of course my client will not be liable for any expenses incurred after his tender to you this forenoon.' The agents for the pursuers replied to the defender's agent as follows:—"120 Constitution Street, Leith, Edinburgh, 12th July 1864.—Duncan & Co. v. Lumsden. Dear Sir,—We have your letter of yesterday. It was not easy to ascertain what Mr Lumsden meant to do when he called for us yesterday, but apparently his proposal was to pay principal and interest alone. He distinctly said he would not pay any judicial expenses. We recommended him to go to his agent and make us a tender in the proper way if he wished to settle the case. He was informed that the case was lodged for calling before he came. It will not be convenient for us to send for payment to-day, but our clients are quite willing to receive payment of principal and interest, if that is not to be disputed, and to take a remit to the auditor to ascertain the amount of the expenses. It is quite evident that you have not been made aware of the circumstances of the case, else you would not hold the opinion that our clients' proceedings have been oppressive. Your client has intentionally, we believe, given our clients a great deal of unnecessary trouble in the matter; and you cannot be surprised at their resorting to any proceedings that appeared likely to secure their debt, when your client himself hinted that they would not get 20s. per pound of their debt. As we presume any charge for this correspondence will be objected to as extrajudicial, we decline to correspond farther on the subject.' To this letter the defender's agent made the following reply:—"Edinburgh, 7 St Andrew Square, 13th July 1864.—Duncan & Co. v. Lumsden. Dear Sir,—I am in receipt of your letter of yesterday's date. Mr Lumsden told me that he distinctly tendered to you payment of the principal and interest claimed by your clients, along with the expenses of the summons, the only thing he refused to pay being the expenses of inhibition, until it was ascertained that these expenses were due by him; and my letter of Monday repeating his offer could leave no doubt as to his meaning. He called here yesterday at twelve o'clock with the money, but as you failed to attend to receive payment, he of course will dispute any claim for expenses after the date of his tender, and also interest on the principal beyond bank rates. If you will send me a state of the debt along with your account, the latter may be adjusted without sending it to the auditor, as you propose; and until I see it, I do not ask it to be taxed. There need be no difficulty in coming to a settlement at once. Mr Lumsden denies that he has intentionally or otherwise caused your clients trouble. He considers he has good reason to resist the present claim; but being averse to enter into litigation, he prefers paying the amount claimed and being rid of your clients."

"6. Notwithstanding the tender made by the defender and his agent of the amount due under said summons, with expenses, the pursuers proceeded with said summons, and lodged the same for calling, and the same was called accordingly."

The questions were tried before the Lord Ord-

nary (Jerviswoode) without a jury, in terms of sec. 48 of the Court of Session Act, under which his judgments on facts is final. His Lordship found (1) that it was not proved that the defender on the forenoon of 11th July tendered payment as averred to the pursuers' agent; (2) that the letters above quoted were written and received; and (3) that no tender was made before the pursuers had lodged the summons for calling.

The defender reclaimed, and urged that the conduct of the pursuers' agents in going on incurring expense after the letter of 13th July was unreasonable; and that on the principle of the case of Ramsay, 19th March 1864, 2 Macph. 891, the party who had acted so unreasonably should be found liable in expenses. It was stated that the dispute about the expenses arose from the fact that the pursuers' agents charged the defender £8, 3s. 4d., as incurred on 13th July, and that the whole sum allowed by the auditor up to that date was £2, 18s. 6d.

The Court adhered.

The LORD PRESIDENT said—All questions of expenses depend very much on the conduct of the party. In this case I think some concession might have been made by the pursuers after the calling when a tender of payment was made. The case, however, of the defender was that a tender was made before the calling, which the Lord Ordinary has found not to be proved, and we cannot review his judgment as to that. I think the letter which the defender's agent wrote might have led to an adjustment of the matter if there had been any disposition to adjust it, but it did not. The question as it has been argued to us might have been left to the Lord Ordinary to dispose of on the letters themselves; but, instead of that, the defender went to trial on his averments, and he has failed to prove them. We must therefore adhere.

SECOND DIVISION.

EDINBURGH AND GLASGOW RAILWAY CO. v. MILLER.

Poor—Assessment—Deductions. (1) Held that, under section 37 of the Poor Law Act, deduction is to be given for the average expense of actual repairs only; (2) Held that one ratepayer is not entitled to deduction on the ground that too large deductions have been allowed to other ratepayers; (3) Circumstances in which held that a railway company was entitled to deductions to the extent of 28'60 per cent.

Counsel for the Suspenders—The Solicitor-General and Mr Mackenzie. Agents—Messrs Hill, Reid, & Drummond, W.S.

Counsel for the Respondent—Mr Patton and Mr W. M. Thomson. Agent—Mr Wm. Burness, S.S.C.

This was a suspension of a charge at the instance of the respondent, who is collector of poor-rates for the City Parish, Glasgow, against the suspenders, the Edinburgh and Glasgow Railway Company, for payment of £862, 15s. 4d., being the arrears of assessment due by the Company for 1858 and 1859, including 10 per cent of additional charges due under section 88 of the Poor Law Act. The assessment for relief of the poor in the City Parish is imposed, one-half on the owners and the other half on the tenants or occupants of all lands and heritages within the parish rateably according to the annual value of such lands and heritages. Since the Lands Valuation Act, 17 and 18 Vict., cap. 91, came into operation, the assessment in the parish has been based on the valuation rolls made up under that Act; a deduction of 20 per cent from the gross rental of all lands and heritages being allowed "for repairs, and insurance, and other expenses necessary to maintain the lands and heritages in their actual state, and all rates, taxes, and public charges payable in respect of the same," conform to 8 and 9 Vict., c. 83, section 37. The

suspenders pleaded that this indiscriminate and equal deduction of 20 per cent. allowed to all lands and heritages is illegal and injurious to them, and that they are entitled to have the assessments rectified; and also that they are entitled to a much larger deduction for the expenses of maintaining the railway under section 37 of the Act. On 17th July 1862, the Lord Ordinary (Kinloch) remitted to Mr George Dods to report "what amount of deduction is proper to be made from the suspenders' lands and heritages within the City Parish of Glasgow, in order to cover the probable annual average cost of the repairs, insurance, and other expenses, if any, necessary to maintain such lands and heritages in their actual state, and all rates, taxes, and public charges payable in respect of the same." Mr Dods reported that, in his opinion, a deduction of 38 per cent. should be allowed to the company. His estimate was founded on an average of the expenses incurred by the company for maintenance and renewal of way, and for taxes, &c., during the twelve years from 1852 to 1864; and he recommended an additional deduction of 5 per cent. to be allowed in respect of the cost of renewing the line, taking the average period of endurance of a railway at sixteen years; and a further deduction of 1'53 per cent. in respect of the deduction of 20 per cent. allowed to other lands and heritages in the parish, being to that extent greater than is allowable under the Act. On 21st June 1865 the Lord Ordinary "found that in estimating the deduction proper to be made from the valuation from the railway, under sec. 37 of the Act, the rates, taxes, and public charges are to be taken as actually payable for the year of valuation, and not to be estimated on any annual average; that there are not sufficient grounds for allowing the percentage of 5 per cent. allowed by the reporter, in respect of the cost of renewing the line over and above the other percentages as allowed by him, nor for the percentage of 1'53 proposed by him in respect of the alleged overestimate of the deduction made in the case of other than railway property. To the above-mentioned effects he sustained the objections to the report by Mr Dods, *quoad ultra* repelled the objections, and approved of the report; and found that a sum amounting to 28'60 per cent. on the valuation of the year, with the amount of rates, taxes, and public charges actually payable for the said year added thereto, represents the legal and proper deduction to be made in terms of the said statute." Against this interlocutor the railway company reclaimed, but the Court to-day unanimously refused the reclaiming-note and adhered to the judgment of the Lord Ordinary.

The following extract from the Lord Ordinary's note explains the nature of the different points decided:—

"1. It appears to the Lord Ordinary, that although, in regard to repairs and other similar expenses, a probable annual average is appointed to be taken, yet as to rates and taxes, it is those actually paid for the year which are to be deducted, and not any hypothetical estimate. The words of the statute seem to him to involve this conclusion. So does its presumable intention; for there is no difficulty in ascertaining the actual taxes, and no necessity for resorting to a hypothetical estimate. If this view be correct, it will result in substituting the actual amount for the percentage of 2'90 proposed by the reporter. Probably the arithmetical difference will not be very great.

"2. It was objected by the respondent, the poor-law collector, that in striking the 'probable annual average' of repairs and other expenses, the reporter had gone wrong in taking any other than the years preceding the year of valuation, because it was only these years which could be possibly taken into view by the Poor Law Board when making their estimate for the particular year. The reporter has taken an average including five years preceding and five subsequent. Now it is quite true that it is only previous years that could be absolutely known.