

tender. He cited *Shaw v. Edinburgh and Glasgow Railway Company*, 1 Macph. 144; *Anderson* 14 S. 54; *Strachan v. Munro*, 7 D. 993; and *Muckarsie*, 11 D. 164.

MILLAR and BURNET for the pursuer were not called on.

The LORD PRESIDENT—This question is very much on the confines of two classes of cases. In the first place, the general rule is that where a person is claiming money compensation, no question of character being in issue, and a tender is made, the party making the tender gets his expenses if the tender exceeds the amount awarded by the jury. On the other hand, where character is involved, it is not enough always to tender money compensation. The party is generally allowed an opportunity of clearing his character. This case to a certain extent may involve character. I would be very far from laying down the general rule that expenses must always follow when a tender exceeds the sum awarded, and as far from laying it down that in all actions of damages for breach of promise of marriage, when there is such a tender made, expenses are never to follow. Much must depend on the nature of each particular case—the position of the pursuer—whether the breach and the reason alleged compromised her character, &c. We have not before us the evidence in this case, but the Lord Ordinary who tried the case having come to the conclusion that in the aspect of the evidence, as it presented itself to his mind, it did involve matter of character, I am not disposed to disturb his judgment. I think the Lord Ordinary has in his note put the matter too absolutely in his endeavour to discover a rule. I don't think this is a case for the application of a rule, but one to be decided according to its special circumstances.

Lord CURRIEHILL—I concur with your Lordship that there is no abstract rule in regard to this matter. Each case depends on its own circumstances. We would have been in a better position to judge of the circumstances of the present case had we heard the evidence as the Lord Ordinary did. But looking to the general features of the case, as stated in the Lord Ordinary's note, I think that if the pursuer had accepted the tender made by the defender, her character would have been compromised, because, simultaneously with the making of the tender, the defender lodged defences, in which he denied the engagement to marry. Now, if a young lady accepts a sum of money to silence her when she is alleging a promise to marry from a man who denies her statements, that would necessarily affect her character. Another circumstance in this case is that the engagement was broken off without any reason being assigned; and on the whole, I see sufficient here to justify the discretion which the Lord Ordinary has exercised.

Lord DEAS—I don't think that what the Lord Ordinary has done in this case interferes in any way with the general rule as to tenders, because he proceeds upon the special circumstances of this case, with which he was familiar. I don't think it was necessary for the defender to admit in his defences that he had done wrong, but he was not justified in denying facts. He does not admit the engagement. He denies having waited on the pursuer's parents, which he certainly did, as appears from his own letters. And then his plea-in-law is that, as the pursuer's statements are unfounded, he is entitled to be assolizied. That was certainly not putting matters on a satisfactory footing for the pursuer. I think it must be inferred that whatever reason the defender had for

not fulfilling his engagement, it was one which he could not justify, and he might have stated in his defence that no blame was imputable to the pursuer. But I look upon this case as quite special.

Lord ARMILLAN concurred.

The reclaiming note was therefore refused with expenses.

Agent for Pursuer—W. S. Stuart, S.S.C.

Agent for Defender—W. Officer, S.S.C.

URQUHART *v.* BONNAR (*ante*, vol. i. p. 217).

Jury Trial—Special Jury. Motion for a special jury on the ground that the case had been already twice tried by a common jury whose verdict was in each case set aside, *refused*.

This case has been already twice tried by a common jury, who on both occasions found for the pursuer. Both verdicts were set aside as contrary to evidence, and a third trial is to take place at the ensuing sittings.

MACDONALD and RHIND, for the defender, moved for a special jury. There had been already twice a miscarriage of justice, which it was desirable should not occur again.

J. C. SMITH, for the pursuer opposed the motion. His client was a poor man, and was entitled to have his case tried by his peers. The result of granting this motion would be to set class against class, which was contrary to the theory and spirit of jury trial.

The Court refused the motion.

Agents for Pursuer—Macgregor and Barclay, S.S.C.

Agent for Defender—Thomas Rankine, S.S.C.

Wednesday, July 11.

FIRST DIVISION.

KEITH'S TRUSTEES *v.* FALCONER AND OTHERS.

Trust—Vesting. Terms of a trust-deed under which held that the capital of legacy vested during the life of the liferentrix.

This was a competition betwixt Ardrian William Keith Falconer, Esq., only son of the late Hon. William Keith, and the marriage-contract trustees of Major Lockwood and his wife, the late Dora Keith Falconer, only daughter of the said Hon. William Keith, in regard to a sum of £6000, referred to in the following clause in the trust-disposition and settlement executed by the Ladies Maria and Catherine Keith, on 7th October 1839;—"In the third place, we direct and appoint our said trustees to hold the sum of £6000 of the trust means and estate hereby conveyed for the purpose of paying over, from the first term of Whitsunday or Martinmas after the death of the longest liver of us, to the Lady Mary Keith during her life, the yearly interest which they may draw for the said sum of £6000; and at the first term of Whitsunday or Martinmas after the death of the said Lady Mary Keith, the said sum of £6000 shall be paid over by our said trustees to the Hon. William Keith (their nephew), whom failing, to his children equally between them, share and share alike."

The last survivor of the two trusters died on 24th August 1851. Lady Mary Keith, the liferentrix of the sum in question, survived till 5th July 1864. Of the beneficiaries, the Hon. William Keith predeceased the two ladies, the trusters, and admittedly no right vested in him to the sum in question. His two children, Mrs Lockwood and Mr Ardrian Keith Falconer, survived both the

trustees, but Mrs Lockwood died before Lady Mary Keith, the liferentrix.

The question was whether the right to the fee of this sum of £6000 vested in these children anterior to the death of the liferentrix, or only vested on that event? The first proposition was maintained by Mrs Lockwood's marriage-contract trustees, who claim the one-half of the sum in her room. The last was maintained by Mr Adrian Keith Falconer, who claims the whole of the sum.

The Lord Ordinary (Kinloch) found the claimants, Lockwood's trustees, entitled to one-half of the provision. He observed in his note:—

“The Lord Ordinary has had no difficulty in finding that the right had vested in the children, and of course the one-half in Mrs Lockwood, on the death of the last of the two ladies, and that the vesting was not suspended till the death of the liferentrix. And, first, let it be considered how the case would have stood had the only beneficiary been the Hon. William Keith, and he had survived the last of the two ladies, but died before the liferentrix. The Lord Ordinary thinks it very clear that the right of fee must have been held vested in Mr Keith on the death of the last of the two ladies, and that vesting could not have been held suspended till the death of the liferentrix, to the effect (which would have in that case occurred) of creating intestacy as to this sum, if Mr Keith predeceased that date. The case would have been the simple one of liferent and fee co-existing. There was a mere postponement of payment, in order that in the meanwhile Lady Mary Keith's liferent might be satisfied. The fee, and the full disposal of the fee, would have belonged all the time to Mr Keith. If this be so, it appears to the Lord Ordinary that the only effect of Mr Keith's dying before the survivor of the two ladies, was to prevent any right vesting in him, and to vest the right in his two children as conditional institutes, to the same effect in all respects as in the case of Mr Keith himself. The two children simply came into his room. His children were called as a class, with the right of sharing equally in the fund. The right is given to them absolutely. There is no destination over in favour of any other person, so as to suspend vesting till it was seen who should survive. As between the children themselves, there is no declaration that the right should go to those of them who should be alive at the death of the liferentrix. There is no benefit of survivorship. The right is alike and equally vested in all. The case is again just that of liferent and fee existing simultaneously—the liferent in Lady Mary Keith, the fee in Mr Keith's children; the postponement of payment as before, being just for the purpose of securing the liferent. The full disposal of the fee belonged in the meantime to the children, just as it would have done to Mr Keith, their father, had he survived and taken. This being, as appears to the Lord Ordinary, the substance of the case in the matter of vesting, he is not affected by the terms in which the settlement is expressed; which bear that the trustees shall pay the interest to Lady Mary Keith, and after her death shall pay the capital to the children of Mr Keith—expressions from which it was inferred that no right arose till the time of payment had arrived. When the question of vesting is attended with doubt, the form of the expression may be material. When, as the Lord Ordinary thinks in the case here, the matter is in substance not doubtful, the mere form of the expression will go but very little way towards affecting the conclusion. “W. P.”

Mr Adrian Keith Falconer reclaimed.

SHAND (with him CLARK) argued in support of the reclaiming note—Mrs Lockwood, who predeceased Lady Mary Keith, the liferentrix, never had any vested interest in the fee of the legacy. The term of payment fixed *after* the death of Lady Mary Keith, and the destination-over, show that it was not the truster's intention that the fee should vest till her death. Where trustees are directed to hold a fund for the purpose of paying the annual proceeds to one person, and after the death of that person to pay or distribute the fund among the members of a class, the rule is now fixed that nothing vests in the members of the class till the death of the liferent. He cited *Young v. Robertson*, Feb. 14, 1862, 4 Macq. 314; *Provan v. Provan*, Jan. 14, 1840, 2 D. 298.

GORDON and ALEX. BLAIR, for Lockwood's Trustees, were not called upon.

At advising—

LORD CURRIEHILL—The third purpose of this trust-deed is the one which has given rise to the present question. The fund *in medio* consists of the sum of £6000 therein referred to. There is no question that one-half of the sum belongs to Mr Adrian Falconer. The dispute relates to the other half. In order to see how the question arises, we must attend to dates. The last survivor of the two testators died on 24th August 1851. They were predeceased by William Keith, who died in 1846, while both his sisters were alive, and of course no right ever vested in him. But he left two children, Adrian and Dora. That was the state of matters at the date of the death of the last survivor of the two ladies. Dora, the daughter of William Keith, died in 1856 without issue. At that time the liferentrix was still alive. Dora, during her life, had executed a deed disposing of her share, if any right vested in her. The liferentrix survived till 1864, and was survived by Adrian, who therefore gets at all events one-half or the £6000. The question is, whether the party in whose favour Dora had made the conveyance is entitled to the other half. That depends on the question whether during the life of the liferentrix the right had vested. If it had vested in Dora then it passed, and if it did not vest till the death of the liferentrix, the whole would belong to Adrian. The Lord Ordinary has found that the right did vest. I think he has come to the right conclusion. If it did vest, it vested in the son and daughter in the character of conditional institutes. I see no indication of any intention whatever that the right of the legatees of the capital should be postponed for any purpose except for the purpose of paying the liferent. And there is one clause which satisfies me that there could be no such intention. Suppose both the children had died before the liferentrix, what would have happened? Neither would have got a single farthing; and, under the clause disposing of the residue, it would have gone to the “Honourable William Keith, his heirs, executors, and assigns.” Now, I put the question—Is there any probability that the testators intended to prefer the collateral heirs of their nephew to his own children? I think there is not, and therefore we have not only no indication to postpone the vesting in this case, but a pretty clear indication that the testators had no such intention.

The other Judges concurred, and the reclaiming note was refused, with expenses.

Agents for A. W. K. Falconer—Gibson-Craig, Dalziel, & Brodies, W.S.

Agents for Lockwood's Trustees—Hunter, Blair, & Cowan, W.S.