

of Halleaths, the testator, who left the legacy sued for, having an interest in the young lady who was to be married, undertook and bound his executors and administrators within six calendar months from his death to pay to the trustees under the marriage-contract the sum of £4000, free of all deductions for duty or otherwise, with interest on the same at the rate of 4 per cent. per annum from the day of the death of the said John Johnstone. If the legacy of £4000 is to be looked upon merely as a direction to his trustees to pay the sum which he had bound himself under the marriage-contract to pay, then it was paid in June 1885, for there is no doubt that the marriage-contract trustees asked for payment of the £4000 given in the marriage-contract, and got it from the testator's trustees or executors in 1885.

Now, looking at the provisions of the marriage-contract, it appears that the trustees were to hold this sum of £4000 for behoof of the husband and wife and the survivor in life-ferent, and the children in fee. The language of the deed is rather involved, but that is the effect of the provisions, but there is also a provision that if children of the marriage failed, then the trustees were to hold it for behoof of John Johnstone himself, *i.e.*, it was to revert to his estate.

There is no such provision attached to the legacy to Mrs Strachey; it was not to revert to John Johnstone's estate. But it is said with reference to the marriage-contract that Mrs Strachey was bound, with respect to any property to which she might acquire right above the value of £200 during the subsistence of the marriage, to make a conveyance of such property to the marriage-contract trustees, to be held, as provided in reference to the sum of £4000, for the survivor of the spouses in life-ferent and for the children in fee. Now, it is said that the right to this legacy was conveyed to the trustees under the marriage-contract; it was not so in fact; but there is no doubt about Mrs Strachey's obligation to pay any sum received during her marriage to her marriage-contract trustees, and no doubt about their right to recover any such sum, and we must deal with the case on the footing that this legacy of £4000 had been properly assigned to them and that they are now suing for it to be held by them for the purposes stated in the trust-deeds applicable thereto.

I need not point out that this is a different trust from that constituted by the marriage-contract provision, and it would seem to follow that a payment in satisfaction of the one trust purpose is not necessarily in satisfaction of the other. The one payment has been made in satisfaction of the marriage-contract provision, but this action is brought by the trustees to recover the legacy, as trustees no doubt, but under a different trust. I therefore cannot concur in the view of the Lord Ordinary that this legacy is in sense and substance indistinguishable from the marriage-contract provision, and that payment in satisfaction of the one is satisfaction of the other.

My view therefore is that the testator's trustees paid the marriage-contract provision as a debt due by the testator which they were bound to pay, and that the legacy is a distinct and separate provision. I think, therefore, we must recal the Lord Ordinary's interlocutor and give decree in favour of the pursuers.

LORD RUTHERFURD CLARK and the LORD JUSTICE-CLERK concurred.

LORD TRAYNER was absent.

The Court recalled the Lord Ordinary's interlocutor, and gave decree for the sum claimed, with interest at the rate of 4 per cent. per annum from 20th December 1884.

Counsel for the Pursuers—Guthrie—Sym—Chree. Agents—J. & J. Ross, W.S.

Counsel for the Defenders—H. Johnston—C. K. Mackenzie. Agents—J. C. & A. Stewart, W.S.

Thursday, March 7.

SECOND DIVISION.

[Lord Low, Ordinary.]

CARSON AND ANOTHER v. M'KELVIE & COMPANY.

Contract—Contract for Delivery of Coal—Exemption from Delivery in Case of Strikes.

A coalmaster contracted to supply a coal merchant with the whole output of cannel coal in his colliery at an agreed-on price for a period of twelve months, it being provided that "strikes or other unforeseen circumstances" should exempt the coalmaster from delivery. During the first six months of the contract wages rose considerably, with the result that the contract became unprofitable to the coalmaster, and in the seventh month he gave notice to the miners working in the cannel coal seam that their wages would be reduced by a shilling per ton, which would have brought them below the ordinary rate of wages paid in the district. The men having thereupon ceased work, the coalmaster was unable for several months to deliver coal in terms of his contract, and the merchant was obliged to buy coal elsewhere at more than the contract price.

The coalmaster having sued the merchant for the price of certain coal which had been delivered under the contract, the defender pleaded that he was entitled to compensate the pursuer's claim with the loss which he had sustained in consequence of the pursuer having failed to deliver coal in terms of the contract.

The Court *sustained* the plea of compensation, *holding* that the pursuer's failure to fulfil his obligation had not

been due to a "strike" in the sense of the contract.

Upon 2nd May 1893 James M'Kelvie & Company, coal merchants, Edinburgh, wrote to Robert Forrester, coalmaster, Glasgow, as follows:—"Dear Sir,—Your telegram received, and note your acceptance of our verbal offer of 11s. 9d. per ton, on trucks at your colliery for the output (viz., 5000 tons) of your Roughrigg (Blackbraes) cannell. Delivery as required during the ensuing twelve months. Please acknowledge receipt." Upon the same day Forrester wrote to M'Kelvie & Company—"Dear Sirs,—I confirm sale to you of 5000 (Five thousand) tons or thereby East Roughrigg Cannel Coal for shipment or land sale. Price 11s. 9d. per ton at the colliery. Terms, nett cash on shipment; land sale, one month."

Until the month of November 1893 Forrester continued to deliver coal as required, which was settled for monthly down to the end of October, but upon November 13th Forrester wrote to M'Kelvie & Company—"Our cannell coal men struck work this morning, and they may not start work again this week, in which case I will be unable to give you more than what we have at present filled." M'Kelvie & Company pressed for delivery of the coal under the contract, but Forrester did not deliver any until the men returned to work in the month of February 1894.

Upon 12th March 1894 David Simpson Carson, C.A., trustee acting under a trust-deed for creditors, granted by Forrester in 1885, and Forrester, raised this action against M'Kelvie & Company for payment of £112, 10s., as the price of coal delivered to the defenders in November 1893.

The defenders averred—"On or about 13th November 1893 pursuer locked out the miners who work his cannell coal because these miners refused to work for a lower wage than the rate current at the time. The men, though willing to work at the current rate, remained locked out until 19th February 1894. During this period the pursuer, though repeatedly called upon to deliver cannell coal to the defenders under his contract, failed to deliver any. He was thereby in breach of his contract. Defenders were obliged to buy in cannell coal at a higher rate in order to fulfil the contracts they had made, relying upon the pursuer fulfilling his. The quantity which the defenders found it necessary to buy in was 1000 tons, and the price was 14s. per ton, being 2s. 3d. per ton higher than the price at which the pursuer was bound to deliver. The defenders therefore suffered loss of £112, 10s. through pursuer's breach of contract, and this sum they have deducted from the amount due by them for coals supplied."

In answer to this averment the pursuers stated that their men "struck work on 13th November, and did not resume till 16th February. During this period the pursuers could not deliver coal, as there was no output, and the strike formed a cause exempting them from making delivery under the contract."

The defenders pleaded—" (2) Compensation. (3) The pursuers having committed breach of contract, the defenders are entitled to deduct from the sum which would otherwise have been due by them to the pursuers the liquid amount of loss suffered by them through pursuers' failure to implement the said contract according to its terms. (4) The defenders, on a true balance of accounts, being due nothing to pursuers, they ought to be assoilzied with expenses."

At the proof it appeared that when the contract was made the wages of the cannell coal-workers were at the rate of 3s. 11d. per ton, and that this was the only cannell coal seam in the district. The cannell coal-workers were paid a higher rate of wages per ton than the miners in the other seams on account of the difficulty of working this kind of coal, although the amount earned per week by all the miners in the pit was much the same. In May and June 1893 there was a fall in the rate of wages to the amount in all of 7d. per ton, but in August there was a rise first of 8d., and then of 10d. per ton. After the latter rise the wages of the cannell coal-workers stood at 4s. 10d. per ton, and that rate of wages was still ruling up to the 11th of November. About that time the pursuers posted a notice in the pit-bottom to this effect—"On and after Monday first the wages will be reduced to the extent of 1s. per ton." The men made no attempt to meet their employers, but left the pit and obtained work elsewhere. This notice applied only to the men working the cannell coal seam, 20 in number, and would have brought their wages per day below what they could earn by working in other pits in the district. In February they returned to work at a reduction of 4d. per ton. No coal was delivered to the defenders between November and February, and in consequence they had to buy 1000 tons of cannell coal at 14s. per ton, to complete their own contracts. The pursuers admitted that after the rise in wages the contract became unprofitable to them.

With regard to the reduction in wages Robert Forrester, manager of the indoor department of the pursuers' business, deponed—" (Q) You posted up a notice that they must accept 1s. a ton less?—(A) But in dealing with workmen with regard to wages as a rule, we ask for a greater reduction than we expect to get. We did not expect to get the whole 1s., but we asked it so as to leave a margin for negotiation." James Mackay, pursuers' pit-manager, deponed—"The men did not send a deputation to me at that time with regard to the matter. When that reduction was to take effect, all the men lifted their graith, and went away on the 13th of November. I did not have any talk officially with the men about the reduction, but I spoke to some of them privately, though they did not say much to me about it. Work was good at the time, and they just seemed inclined to let the matter stand in the meantime. They walked away with their graith as if they did not care to enter into any negotiations at all. They did not approach me with a

view to asking me whether I would not make the reduction less." "Cross.—(Q) What did you understand was meant by a substantial reduction?—(A) Not 2d. or 3d., but as much as I could get. I was empowered by my masters to fix the amount. (Q) At what rate would you have allowed the men to work?—(A) I expected to get 6d. off. I made no proposal to reduce the wages in regard to the soft coal. The wages are highest in the case of cannel coal, and the second place is taken by the soft coal." John Drysdale, miner, deponed—"Then in that month there was a reduction of 1s. per ton intimated. On receiving that notice, all of us lifted our graith and went away. (Q) Were you willing at that time to accept any reduction?—(A) We never went to ask any of it back. Reductions are sometimes intimated at a higher figure than the coalmaster expects to get. If we are willing to take a reduction we go to the coalmaster and see how little he will accept. In this case we did not want to have any reduction at all, and that was why we lifted our graith."

Upon January 9, 1895, the Lord Ordinary (Low) pronounced this interlocutor:—"Sustains the pursuers' pleas in law; repels the defences; and decerns against the defenders in terms of the conclusions of the summons," &c.

"*Opinion.*— . . . The first question is, what is the meaning of the word 'strike' as used in the contract between the pursuers and the defenders? The defenders argued that the word 'strike' was only applicable to a case where the men ceased working because their employer refused a demand made by them. If, therefore, the question in dispute was the rate of wages, it was only a strike if the men stopped work because the master refused a rise of wages demanded by them. If the men stopped work because they would not agree to a reduction of wages proposed by the master, it was not a 'strike' but a 'lock-out.'

"I apprehend that the words 'strike' and 'lock-out,' as used in such cases as this, are phrases which have come to be used as short and convenient terms for expressing a certain condition of matters between master and workmen. I therefore think that the words, when used in a trade contract, must be interpreted according to the meaning which has been put upon them by usage.

"Now, I am not aware of any usage which would limit the word 'strike' in the way for which the defenders contend. I think that I am right in saying, that the bulk of the cases which have occurred in recent years of workmen refusing to continue to work have arisen because of a proposal on the employer's part to reduce wages. Yet these cases have been always described as strikes by everyone concerned.

"A 'lock-out' I take to be a matter of much rarer occurrence, and to apply to the case of a master turning his men out and refusing to allow them to continue to work, although there may be no dispute between them as to the rate of wages or otherwise.

"I am therefore of opinion that when the pursuers' miners left their colliery in November 1893 a strike occurred within the meaning of the contract, and the consequent stoppage of deliveries of coal was not a breach of the contract, unless it is established that the 'strike' was truly brought about by the pursuers with the fraudulent design of escaping from the contract which they had made.

"In my opinion the evidence negatives such an idea. It was conceded by the defenders' counsel that the pursuers would, in a question with the defenders, have been entitled to refuse to pay their miners a higher rate of wages than that current when the contract was made, and, that if the miners had struck work because a higher rate was not granted, cessation of deliveries under the contract would not have involved a breach. When, therefore, the rate of wages rose in August to 10d. above the rate current when the contract was made, the pursuers would have been entitled to refuse to give that rise, although the result might, and no doubt would, have been that the miners would have struck, and deliveries under the contract would have ceased.

"Now, what the pursuers actually did was to continue deliveries under their contract for nearly three months after the large rise of wages which took place in the month of August. That showed that, as Mr Forrester said, the pursuers were honestly anxious to fulfil their contract, and that they did not run the risk of stopping deliveries by refusing the rise of wages which took place in August although they were entitled to do so. They preferred to carry on as long as they could in the hope that the state of the labour market would again lead to a reduction of wages. By November, however, the loss under the contract was becoming serious, and therefore the pursuers proposed a reduction of wages.

"The amount of the reduction proposed by the pursuers would, if accepted by the men, have brought the rate of wages down to 1d. below that at which it stood when the contract was made. But it seems to me that there is no doubt from the evidence that the amount of the reduction intimated was not intended by the pursuers to be, and was not regarded by the men as, an ultimatum. It was an intimation that the employers had resolved upon a reduction of wages, but it did not shut the door to negotiations as to the amount. Mr Forrester and his manager both said that they would have been satisfied with a reduction of 6d. per ton, and the men were actually re-engaged in February at a reduction of only 4d. per ton, which left the rate of wages considerably higher than when the contract was entered into.

"I am therefore of opinion that in November 1893 there was a strike within the meaning of the contract, and that that strike was not brought about fraudulently or improperly by the pursuers with the object of getting rid of the contract."

The defenders reclaimed, and argued—(1)

The stoppage of the workmen was not a strike, it was a lock-out. The men were willing to go on working at the wages prevalent in the trade, but the pursuers issued an order for such a reduction of wages as they knew the men would not accept, and therefore drove them away from the pits. (2) Assuming that this was a strike, then it was fraudulently brought about by the pursuers, and they could not make it a ground for claiming to be relieved from damages for breach of contract. A strike within the meaning of the strike clause of the contract must be a general strike, or at least a strike of all the miners at that pit, and not merely a stoppage of work by the men engaged in the work of carrying out the special contract. Otherwise the coal-owner had simply to offer his men wages he knew they would not accept and he would be quit of an unprofitable contract—*Letricheux v. Dunlop*, December 1, 1891, 19 R. 209; *Stephens v. Harris*, 1887, 56 L.J., Q.B.D. 516; *King v. Parker*, June 14, 1876, 34 Law Times Repts. 887; *Moes, Moliere & Tromp v. Leith & Amsterdam Shipping Company*, July 5, 1867, 5 Macph. 988.

The pursuers argued—A strike meant that the men working in the pits had refused to go on working. It was absurd to say that a strike under the clause in this contract must be a strike of all the men employed at this pit, because the contract was only about the cannel coal, and plainly indicated that a strike of the cannel coal workmen was the only one contemplated. If the Court found that the men had struck work, and were in fact not working, on account of a difference about wages with their employers, the Court could not go behind that fact and inquire whether the strike arose from the fault of the men or of the master—*Letricheux v. Dunlop*, cited *supra*. The action of the employers must be taken to be in *bona fide* and in protection of their legitimate interests. The masters here had given notice of a reduction of 1s., but they would have taken a smaller one, and in fact did take the men back in February at a reduction of 4d. That showed their *bona fides*.

At advising—

LORD YOUNG—In this case a contract was made between Robert Forrester, a coal-master, and M'Kelvie & Company, coal merchants in Edinburgh, in May 1893, for the whole output of a particular seam of the mine, "viz., 5000 tons of the Roughrigg cannel coal during the ensuing twelve months;" and in one of the letters constituting the contract there is this provision—"N.B., Strikes or other unforeseen circumstances exempt me," *i.e.*, Robert Forrester "from delivery."

The contract was immediately acted on, the purchaser of the coal intimating that he required supplies, and receiving supplies from the colliery from May to November. On 20th November the purchaser required delivery of a certain amount of coal, but that delivery was not made, on the allegation of the coalmaster that there was a

strike among his miners, and that he was entitled to refuse delivery under the strike clause.

It appears that between the date of the contract and November the wages of the miners had risen considerably, so as to make this an unprofitable contract to the coalmaster. He accordingly applied to the purchaser to relieve him of the contract on the ground that it had turned out to be a very unprofitable contract to him on account of the rise of wages that had taken place, but the purchaser refused to relieve him of the bargain and sent him orders for delivery of coal, which were refused, on the ground that the men would not work the coal except at wages which Forrester was not inclined to give.

It is not disputed that wages had risen since the beginning of the contract, and that Forrester had lost considerably in giving deliveries. He then proceeded to deal with the twenty men who were working at this seam in the pit. He put up a notice that there would be a reduction of one shilling per ton upon their wages. The men refused to accept that reduction—and it is not disputed that this proposed reduction was a reduction upon the similar wages which were being paid to their men by the coalmasters in the surrounding district—and the twenty miners went elsewhere.

I have very little doubt that the fact that he was losing money upon this contract to deliver the whole output of the seam in question induced Forrester to propose the reduction of one shilling. The question we have to consider is whether or not the fact that the men refused to go on working at the reduced wage is a strike, and is to be regarded as a strike or other unforeseen circumstance exempting Forrester under the strike clause in the contract from damages for not delivering the coal when required.

There is no dispute as to the pursuer's failure to deliver coal to the extent of 1000 tons, and it is admitted that he will be responsible as for breach of contract, unless this stoppage of work is a strike or unforeseen circumstance within the meaning of the clause in the contract.

The question arises in an action at the instance of the coalmaster for payment of certain sums in respect of the delivery of coals which were actually delivered, but the defender says he is entitled to set off the difference between the contract price and the price he had to pay to other parties for cannel coal, as reparation for the pursuer's breach of contract in not giving delivery after November.

The Lord Ordinary was of opinion that this was a strike within the meaning of the contract, and that therefore the failure to deliver the coal was not a breach of contract entitling the purchaser to reparation, and accordingly granted decree in terms of the conclusions of the summons.

I am of opinion that there was here no strike or other unforeseen circumstances excusing the coalmaster's failure to answer

the demands of the purchaser in and after November, and that therefore he was in breach of contract from which he was not exempted by strikes or other unforeseen circumstances of the kind contemplated in the contract.

I am satisfied that the pursuer here was in no exceptional circumstances at all. There was no strike of the miners in the neighbourhood, but I think that, prompted by the unfavourable position he was put into under the contract, he determined to ask his men to take lower wages than others were earning elsewhere, so that their refusal might prevent him going on with his contract, and that the refusal of the men to continue work at the lower wages was not a strike or other unforeseen circumstance. The expedient he resorted to was prompted by the loss he had already suffered, and was a device so prompted to get rid of the contract he had entered into, if not permanently, then at least until wages had again fallen, and it will not now serve him to put forward this expedient as showing there was no breach of contract on his part. In my opinion there was a breach of contract, and the defender is entitled to set off the loss he suffered against the claim for payment made upon him.

LORD RUTHERFURD CLARK—I do not think this case presents any general question at all, and we do not need to consider any general question, but in the special facts of this case I think the defender is entitled to the damages he claims.

The LORD JUSTICE-CLERK concurred.

LORD TRAYNER was absent.

The Court recalled the Lord Ordinary's interlocutor, and assoilzied the defenders.

Counsel for the Pursuers—W. Campbell—Salvesen. Agents—Webster, Will, & Ritchie, S.S.C.

Counsel for the Defenders—Dundas—Ure C. N. Johnstone. Agents—Richardson & Johnston W.S.

Saturday, March 9.

FIRST DIVISION.

EDDINGTON v. EDDINGTON.

Husband and Wife—Divorce for Desertion—Married Women's Property Act 1881 (44 and 45 Vict. c. 21), sec. 6.

The provision of section 6 of the Married Women's Property Act 1881, which, in the event of a marriage being dissolved by the death of the wife, confers upon the husband the right to a share of her moveable estate, does not apply in the event of the wife being divorced.

Colonel Smollett Montgomerie Eddington raised an action in the High Court of Justice in England against Mrs Isabella Mary

Forman or Robertson, widow of Captain George Andrew Robertson, and sometime wife of the plaintiff.

On 12th November 1894, on application of the plaintiff, Mr Justice Chitty remitted the case for the opinion of the Court of Session upon certain questions of law.

The facts of the case, as stated in the schedule annexed to the order, were as follows:—“(1) Colonel Smollett Montgomerie Eddington, the plaintiff in this action, is, and always has been, a domiciled Scotsman. (2) On 25th April 1867 he married the defender Mrs Isabella Mary Forman or Robertson (the widow of Captain George Andrew Robertson), and she thereupon went to reside with him in Scotland, and acquired his domicile. (3) No marriage-contract or settlement was executed upon either of the marriages of the defendant, and there has been no issue on either of the marriages. (4) On the 18th July 1893 the plaintiff obtained a decree of divorce against the defendant in the Court of Session in Scotland on the ground of desertion. (5) The plaintiff made no provisions for the defendant in consideration of the said marriage, and the defendant has acquired no means or estate by or in consequence of her marriage with the plaintiff. (6) The defendant had at the date of the said divorce moveable estate amounting to upwards of £500, consisting of unexpended income of funds settled by the will dated in 1852 of her grandfather, who died domiciled in England on 21st July 1852, and by the will (dated in 1862) of her uncle, . . . who died domiciled in England on 28th August 1869. . . . The defendant was possessed of or entitled to other moveable estate of some value at the date of the said divorce. (7) The defendant resides in England and has not married again.”

The plaintiff contended that by the law of Scotland the effect of the divorce was that he became entitled to the same benefits in the defendant's moveable estate as if she were dead, *i.e.*, to one-half of her moveable estate. The defendant disputed this, and contended that in any view he was barred from claiming any part of her moveable estate now, not having claimed any declaration as to his rights in the summons of the action of divorce.

The questions submitted for the opinion of the Court of Session were—“(a) What rights, if any, accrued to the plaintiff upon the decree of divorce being pronounced, in respect of the moveable estate of the defendant existing at that date? (b) Whether he is barred from now claiming the same by the terms of the said decree of divorce?”

The case was brought before the Court on the petition of the plaintiff under the Act 22 and 23 Vict. c. 63.

Sec. 6 of the Married Women's Property Act 1881 (44 and 45 Vict. c. 21) enacts—“After the passing of this Act the husband of any woman who may die domiciled in Scotland shall take by operation of law the same share and interest in her moveable estate which is taken by a widow in her