

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

deceased husband's moveable estate, according to the law and practice of Scotland, and subject always to the same rules of law in relation to the nature and amount of such share and interest, and the exclusion, discharge, or satisfaction thereof as the case may be."

The Statute 1573, c. 55, which regulates divorce for desertion, enacts—"After due procedure the malicious and obstinate defection of the parties offender to be an sufficient cause of divorce, and the said party to tyne and lose their tocher and *donationes propter nuptias*."

Argued for the petitioner—By sec. 6 of the Married Women's Property Act 1881 (44 and 45 Vict. c. 21) a husband was given the same rights in the moveable estate of his wife in the event of her predecease, as a wife previously had in the moveable estate of a predeceasing husband. This section was operated on by common law so as to make the rights accruing at death come in at divorce, which was legal death—*Ersk. i. 6, 468, approb. the dictum in Stair, i. 4, sec. 20; Harvey v. Farquhar, June 21, 1872, 10 Macph. (H. of L.) 26; Fraser v. Walker, February 22, 1872, 10 Macph. 827, at 843, where it was laid down, following Stair's dictum, that the guilty party lost all benefit, and the innocent one took the same benefit as he would by death—M'Elmail v. Lundie's Trustees, October 31, 1888, 16 R. 47. The Statute of 1573 was interpreted by all later cases to make the effects of divorce for desertion the same as those of divorce for adultery—Bell's Comm. i. 680, for the husband's right to courtesy on divorce. In *Johnstone Beattie v. Johnstone*, February 5, 1867, 5 Macph. 340, a father bound himself to pay an annuity of £200 to his son, "whom failing" to his son's wife. That was a very strong case for holding that death was meant, but the Court held that the wife having divorced her husband was entitled to the annuity as though he were dead. This reasoning might equally be applied to the terms of the statute as well as to those of an antenuptial marriage-contract.*

Argued for the respondent—Sec. 6 did not apply to any other event than that of "dying domiciled in Scotland." An Act could not be considered as extending the common law to the extent claimed by the petitioner so as to extend the penalty contained in the penal Statute of 1573, c. 25. Moreover, divorce for desertion was the creature of the Statute of 1573, and its effects on property were defined in that Act. Divorce for adultery, on the other hand, was the result of common law, and its effects on property could not be referred to divorce for desertion. Nothing was contemplated in the Statute of 1573 but forfeiture of the right the party would otherwise have had from the marriage; there was no idea of conferring upon the other spouse the rights he would get by death—*Harvey v. Farquhar, supra; Mackenzie v. Mackenzie, March 18, 1893, 20 R. 636, at 663. Stair's dictum* was obscurely put, and was not justified by the case he quoted. There was no

other case in which it had been attempted to enforce rights against a spouse's property in a divorce for desertion. The cases quoted by the petitioner did not apply, for they dealt with provisions made *intuitu matrimonii*, while these legacies were nothing of the kind—*Mason v. Beattie's Trustees, October 17, 1873, 6 R. 37*, showed that even in settlements it did not follow that the divorced spouse forfeited his rights, unless it could be shown to be the testator's wish and intention.

The Court made the following answer to the question submitted to them:—

"The Lords of the First Division of the Court of Session, having considered the petition of Smollett Montgomerie Eddington, with case for opinion of this Court, and order by the High Court of Justice desiring the opinion of this Court on the questions of law therein propounded, and having heard counsel thereon for the said Smollett Montgomerie Eddington, and also for Isabella Mary Forman or Robertson, respondent, make answer to the said questions as follows:—(1) No right accrued to the plaintiff upon the decree of divorce being pronounced in respect of the moveable property of the defendant existing at that date: Apart from the Married Women's Property (Scotland) Act 1881, no such claim could have been put forward, and that statute does not support the claim, for it confers right upon the husband only in the event of the death, and not in the event of the divorce, of the wife: (2) Had any right accrued to the plaintiff, he would not have been barred by the terms of the decree of divorce from now claiming it.

LORD KINNEAR was absent.

Counsel for the Petitioner—C. S. Dickson—M'Clure. Agents—J. W. & J. Mackenzie, W.S.

Counsel for the Respondent—Mackay—Clyde. Agents—Lindsay, Howe, & Company, W.S.

Tuesday, March 12.

SECOND DIVISION.

[Sheriff-Substitute at Glasgow.

DAVISON v. D. & W. HENDERSON
& COMPANY.

Reparation—Master and Servant—Cause of Accident—Proof.

In an action of damages brought under the Employers Liability Act, there being a conflict of evidence as to whether or not the accident to the workman had been caused by a defect in the machinery for which the employer was responsible, and the witnesses on both sides being apparently