of no consequence as regarded the the question of insanity. Nothing but mental disease, clouding and dethroning the mind, could excuse from the commission of an act of murder.

The jury, after an absence of fifty minutes, returned a verdict unanimously finding the prisoner guilty as libelled, while a minority of the jury added a recommendation to mercy.

Sentence was delayed until Wednesday, Jan. 10, when the prisoner was sentenced to be executed at Montrose, on 31st January, betwixt the hours of two and four o'clock P.M.

COURT OF SESSION.

Wednesday, Jan. 10.

FIRST DIVISION.

PETITION—HUGH SWAN.

Process—Minor. The Court will not appoint a curator *ad litem* to a minor who does not enter appearance.

Counsel for Petitioner—Mr Skelton. Agents—Messrs Trail & Murray, W.S.

This was a petition for the removal of a trustee and the appointment of a factor on a trust estate. No answers were lodged or appearance made for the trustee, and in respect thereof the prayer was granted. The counsel for the petitioner proposed that before disposing of the petition a *curator ad litem* should be appointed to a minor, to whom the petition had been intimated, but who did not appear. The Court refused to make the appointment because the minor did not appear, although he might have done so.

SECOND DIVISION.

ADV.—WOLSKI *v.* M'INTYRE.

Building Contract—Clause of Reference. A clause of reference in a building contract of "all disputes and differences" does not embrace a claim of damages arising to one of the parties from the failure of the other to perform his part of the contract.

Counsel for the Advocator—Mr A. B. Shand and Mr R. V. Campbell. Agent—Mr Alex. Cassels, W.S.

Counsel for the Respondent—Mr Patton and Mr N. C. Campbell. Agents—Messrs Patrick, M'Ewan, & Carment, W.S.

This is an advocation from Lanarkshire. Mr M'Intyre sues Mr Wolski for the balance of the contract price of building the Ladies' Institution in Bath Street, Glasgow. Mr Wolski defends on the pleas (1) that the building is not finished according to plan, and that damages are therefore due; and (2) that certain deductions fall to be made from the account. The pursuer admits that the buildings are not exactly according to plan, but avers that he had the architect's sanction for the deviations, and he denies any right to the deductions claimed. In the building contract there is a clause of reference of "all disputes and differences" to Mr Salmon, the architect of the building. The pursuer, in suing for the balance of the contract price, urged upon the Sheriffs that the questions raised by the defender properly fell to be decided under the clause of reference. The defender, Mr Wolski, on the other hand, moved that a proof should be allowed. Sheriff Bell held the arbiter disqualified *personali exceptione*, and allowed a proof. On appeal, Sheriff Alison altered, held the submission operative as to the questions raised, and, notwithstanding the defender's opposition, remitted to Mr Salmon to decide. The pursuer went before Mr Salmon, but the defender refused to appear. Mr Salmon, in the defender's absence, reported to the effect that the building was not according to plan, but that the deviation did not, in his opinion, lessen the intrinsic value of the building. He did not say that he had authorised the deviation. Sheriff Bell refused to give decree upon this report, holding that if the questions fell under the submission the action should have been dismissed. Sheriff Alison, on appeal, gave decree for the balance sued for. Mr Wolski, the defender, now brought this advocation, and moved that the Sheriff's interlocutors should be recalled, and that a proof should be allowed. After hearing junior counsel on each side the Court to-day advocated the cause, recalled the interlocutors in the Court below, and ordered issues, in order that the whole case might be proved before a jury. The Court held that the clause of reference was a merely ancillary or executorial clause for the decision of practical difficulties during the execution of the contract, and that a claim of damages such as the defender set up did not fall under such a reference. They found Mr Wolski, the defender, entitled to expenses in the Court of Session and also in the Sheriff Court, from and after the interlocutor of Sheriff Alison remitting to the arbiter.

Thursday, Jan. 11.

FIRST DIVISION.

KNOX *v.* MACARTHUR.

Jurisdiction—Poor Law Amendment Act. Issues in an action of damages disallowed in respect the questions proposed to be tried under them could only be tried in the Sheriff Court under section 86 of the Poor Law Amendment Act.

Counsel for Pursuer—Mr Scott. Agent—Mr D. F. Bridgeford, S.S.C.

Counsel for Defender—Mr Watson. Agents—Messrs J. & J. Turnbull, W.S.

The pursuer was, on 13th September 1864, an inmate of the New Monkland Poorhouse. The defender is schoolmaster of the parish and a member of the Visiting Committee of the Poorhouse. The pursuer alleges (1) That on said date the defender assaulted him; (2) That he thereafter falsely and maliciously gave information to a police constable that the pursuer had assaulted him, in consequence of which the pursuer was apprehended; and (3) That he falsely and maliciously gave information of the said assault to the Procurator-Fiscal in consequence of which the pursuer was imprisoned and detained for two days. He now proposed for trial three issues, embodying these separate grounds of action.

There were originally two actions of damages in regard to this matter—one against the present defender, and the other against Alexander Montgomery, also a member of the Visiting Committee of the Poorhouse. Both defenders pleaded that the actions were incompetent in the Court of Session in respect the 86th section of the Poor-Law Amendment Act (8 and 9 Vict. c. 83) provides that all actions on account of anything done "in the execution of the Act" shall be brought before the Sheriff Court. Lord Kinloch repelled the plea in both cases, but on reclaiming notes the Court, on 7th June 1865, dismissed the action against Montgomery, and in this case repelled the defender's plea-in-law only in so far as it imported that the action should be *in hoc statu* dismissed. The chief difference betwixt the two cases was that in this case the defender was said to have assaulted the pursuer, whereas in the other case it was only averred that Montgomery was present and saw the assault upon the pursuer committed.

The defender did not object to the issue founded on the assault; but he said that in regard to the other two issues the case was in precisely the same position as that of Montgomery, which had been

dismissed. He also urged as a separate objection to the third issue that a person, though he did give false information to a Procurator-Fiscal, was not liable for damages in respect of what was done after the Fiscal had opportunity to inform himself on the subject. The pursuer replied that this case was different from Montgomery's, because the assault could not be pretended to have been committed in execution of the statute, and what followed was all bound up with it. What the defender did was to assault the pursuer, and having done so, to go to the police and the Fiscal, and pretend that the pursuer had assaulted him.

The Court unanimously disallowed the second and third issues, holding that in regard to them this case was not distinguishable from that of Montgomery. If it was the fact that the information to the police was given as represented by the pursuer, the whole could be proved at the trial under the first issue as part of the *res gestæ*.

MACKENZIE (DIXON'S TRUSTEE) *v.* GOLDIE.

Expenses. A defender who unsuccessfully opposed the allowance of issues on the ground that the action was irrelevant, found liable in expenses from the date of closing the record.

Counsel for Pursuer—Mr Patton and Mr W. M. Thomson. Agents — Messrs Melville & Lindesay, W.S.

Counsel for Defender—Mr Pattison and Mr Hall. Agent—Mr James Sommerville, S.S.C.

This case was reported by the Lord Ordinary upon Issues. The Court after a long discussion allowed the proposed issues, and in respect the objections stated by the defender were not directed to the form of the issues, but to the relevancy of the pursuer's averments, the defender was found liable to the pursuer in expenses since the date of closing the record.

MP.—BRITISH LINEN COMPANY *v.* MACKENZIE AND OTHERS.

Donation—Deposit Receipt—Proof. A person averring verbal donation of a deposit receipt allowed (alt. Lord Kinloch) a proof *pro ut de jure* before answer.

Counsel for Reclaimer—Mr Lorimer and Mr Hall. Agent—Mr John Neilson, W.S.

Counsel for Competing Claimants—Mr Watson and Mr MacEwan. Agents—Messrs Grant & Wallace, W.S., and Mr George Cotton, S.S.C.

This was a competition for a sum of £100 contained in a deposit receipt in favour of Peter Ross, residing in College Wynd, Edinburgh, who died intestate on 30th December 1863. The deposit receipt was dated 16th March 1863. The amount was claimed by Mrs Margaret Bertram or Muir, residing in Sauchiehall Street, Glasgow, on the ground that Peter Ross made a donation of the receipt to her on 28th December 1863. She averred that Ross had known her in her childhood, and interested himself in her education; and on 26th December she proceeded to Edinburgh at his anxious request and took up her residence in his house in order to attend to him in his last illness. Two days afterwards he gave her this deposit receipt, blank endorsed, declaring his intention that it should be an instant donation to her. In two days more he died.

LORD KINLOCH repelled Mrs Muir's claim, holding that donation could not be proved by parole evidence. The mere possession of a deposit receipt may, his Lordship observed, "evidence nothing but an unceremonious investigation of the repositories of the deceased." The only other evidence which she offered was that of herself and of parties who had heard the deceased anterior to the donation express his intention to make it, and, after it was made, state that he had done so. This evidence, the Lord Ordinary thought was incompetent. Mrs Muir reclaimed, and contended that although donation was not to be presumed, there was no absolute rule in the law of Scotland that parole evidence of it was incompetent. She founded on the case of the National Bank *v.* Bryce, where the Court recently allowed a proof before answer in regard to an alleged donation of a bank cheque.

After hearing Mr Hall, the Court asked the other side if they objected to a proof before answer. This was consented to, and the Court recalled the Lord Ordinary's interlocutor and allowed a proof.

SECOND DIVISION.

SMITH *v.* SMITH.

Husband and Wife—Title to Sue—Marriage Contract Provision — Desertion. (1) A wife has a title to sue her husband for payment of a provision to her in her marriage contract, although trustees were nominated in the contract at whose instance action and execution should pass. (2) A wife who has deserted her husband may sue him for payment of such provision, although she could not sue him for aliment, that being an equitable claim.

Counsel for the Pursuer—Mr Patton and Mr Asher. Agents—Messrs Paterson & Romanes, W.S.

Counsel for the Defender—Mr Fraser and Mr Scott. Agents—Messrs Wotherspoon & Mack, S.S.C.

This is an action at the instance of Mrs Isabella Bain or Smith, wife of Mr Adam Smith, writer in Falkirk, and is directed against her husband. The conclusions of the action are for two half-yearly instalments of an annuity of £60, which the pursuer says is due to her under an antenuptial contract of marriage entered into between them on the 11th of August 1847, by which the defender settled that yearly sum on the pursuer; and further, that the defender should be decerned and ordained to settle and secure at the sight of the Court, in terms of the contract of marriage, the said free yearly annuity of £60 to and in favour of the pursuer, the same to be secured so as to be paid to her during the subsistence of her marriage with the defender, exclusive of the *jus mariti* of the defender, courtesy of Scotland, or other title, and also exclusive of liabilities for his acts and deeds and the diligence of his creditors, and thereafter during her viduity, if she shall survive her husband. There is an alternative conclusion that the defender should be ordered to consign £2000, in order that the same be invested at sight of the Court for payment of the annuity. There is an additional conclusion that the defender should pay the pursuer the sum of £1248, 16s. 5d., being the one-fourth part or share of her father's estate, to which the pursuer is entitled, exclusive of the *jus mariti* of her husband, or that he is bound to make it forthcoming that she may invest it.

After living for some time together the wife left the society of her husband, and they are now living separate. The defender, in respect of such desertion, pleads that he is not bound to pay the annuity. In the marriage contract there was a clause nominating trustees, at whose instance action and execution should pass, and upon this clause the defender pleads that the pursuer had no title to sue. To this the pursuer answered that of the persons named as trustees four are dead, one, if alive, is out of the country, and the others declined to act. The Lord Ordinary (Kinloch) repelled the objection to the pursuer's title to sue, holding that, besides the pursuer's answer, the nomination of trustees in a marriage contract, however convenient in many supposable circumstances, does not deprive the wife of her personal right to sue (with a curator *ad litem*) for fulfilment of her marriage contract. On the merits his Lordship found that the defender was bound to pay the annuity—the marriage contract containing no conditions warranting a refusal. Whatever was the motive of the parties for entering into such an