

because the party himself had not made himself aware of the fact which it was still his duty to communicate, and in such a case a plea of liberation from the contract would be taken and sustained. I do not recollect of any case of fraudulent concealment in which it did not appear from the statements on record that there was a duty to communicate. I think that is not set forth here. But there may be a case of fraudulent misrepresentation on this record which, though not amounting to express words of assurance, would yet entitle the pursuer to an issue. Thus, if in answer to a question, What is the balance for which the pursuer was to become bound? the defender gave him his ledger, and said, there is my ledger, and pointed out the page, that would amount to a case of misrepresentation; and if the defender knew that the balance stated in the ledger was not the true balance, that would amount to a case of fraudulent misrepresentation. Concealment may aid a case of misrepresentation, but misrepresentation will not aid a case of concealment. I am not prepared to say that there are not materials for an issue of misrepresentation here, but I should like to see the issue the pursuer proposes.

The pursuer thereafter proposed the following issue:—

“Whether the defender, David Jenkins, by fraudulent misrepresentation as to the number and extent of the accounts claimed by him from the defender, James Rankine, induced the pursuer to become a party to the minute of reference, No. 29 of process, as cautioner for the said James Rankine?”

He also asked leave to add the following plea in law:—

“The defender David Jenkins, having made fraudulent misrepresentations as to the accounts and claims for which the pursuer was to become cautioner, the pursuer is entitled to have his obligation reduced and set aside.”

PATTISON for the defender argued—There is no statement on record to support an issue of misrepresentation. No plea to that effect was stated in the closed record. The representation referred to in Cond. 8 is said to have been made on the same day as the minute of reference was signed—whether before or after is not mentioned—but in Cond. 6 it is stated that the parties had previously agreed to refer to Mr Mackenzie. Besides, the issue asked is too general in its terms, and ought to contain the date of the representation referred to in Cond. 8.

The Court altered the issue to the effect of inserting after the words “extent of the accounts,” the words “and the amount of the balance.” Expenses were reserved.

Agent for Pursuer—John Thomson, S.S.C.

Agent for Defender—James Sommerville, S.S.C.

Friday, July 6.

FIRST DIVISION.

KENNEDYS v. MACDONALD.

Proving the Tenor—Casus Amissiois. Averments that certain testamentary writings had been destroyed by the maker of them, or by others under her directions, when she was in an unsound state of mind, or without her authority, of which a proof allowed before answer.

This action was brought to prove the tenor of

four testamentary writings executed by the late Mrs Macdonald of Lassintullich, in and prior to October 1860, which the pursuers founded on as containing their title to sue an action of reduction on the ground of facility and circumvention of a disposition and deed of settlement executed by Mrs Macdonald in favour of the defender, her son, on 9th May 1863. The reduction had been sisted by Lord Kinloch until the present action was brought and disposed of (*ante*, vol. i. p. 88). The pursuers averred—

Cond. 8. The said Mrs Macdonald was a very old woman, being upwards of eighty years of age, and in or about the beginning of the year 1862, her infirmities both of body and mind had so much increased as to render her an entire imbecile, of unsound mind, memory, and understanding, incapable of managing her affairs, or of performing or understanding the effect of any legal act. She continued in this state, gradually becoming worse, till her death in January 1865.

Cond. 9. While the said Mrs Macdonald was in the said imbecile and unsound state of mind, the pursuers believe and aver that the four writings above-mentioned, which constituted her settlement, were destroyed or otherwise made away with, either without her authority by those about her, or by herself, or under directions obtained from herself, at a time when she was imbecile and of unsound mind, and incapable from mental infirmity of understanding what she did.

Cond. 10. More particularly the pursuers believe and aver that upon the marriage of the pursuer, Mrs Kennedy, which took place in May 1862, the said deceased Margaret Macdonald (a sister of the female pursuer and of the defender), and thereafter the defender David Macdonald, obtained complete possession of the said Mrs Macdonald, and of her house in which she lay bedridden, as she had done for some years, and having access to her repositories, and possession of all her papers, the said Margaret Macdonald and David Macdonald, or one or other of them, did fraudulently, and without authority from the said Mrs Macdonald, destroy or otherwise make away with the four deeds of which the tenor is sought to be proved in the present action.

Cond. 11. Otherwise the said deeds were destroyed by the said Mrs Macdonald, or by the said Margaret Macdonald or David Macdonald, or some other person or persons, under directions obtained from the said Mrs Macdonald, at a time when she was imbecile and of unsound mind, memory, and understanding, incapable of understanding what she did, or of performing any legal act.

Cond. 12. Otherwise the said deeds were destroyed by the said Mrs Macdonald, or by some other person or persons, under directions obtained from her, when she was in a weak and facile state of mind, and easily imposed upon, and they were so destroyed or directed to be destroyed by means of fraud and circumvention employed by the said Margaret Macdonald or David Macdonald, who, or one or other of whom, took advantage of the said Mrs Macdonald's weak and facile state of mind to impetrate and obtain from her the destruction of the said deeds to her lesion.

Cond. 13. The said deeds, however disposed of, were not in the deceased's repositories at her death, and are now lost and cannot be found, although the most diligent search has been made for them, and the pursuers are therefore under the necessity of instituting the present action to prove their tenor.

The defence was that the documents were got up by the deceased in July 1862, from her agent, John Galletly, S.S.C., for the purpose of destroying them, and were accordingly destroyed by her or by her orders; and that at that time she was of sound mind and perfectly capable of managing her own affairs. The defender also pleaded that the statements of the pursuers were not sufficiently specific.

The Lord Ordinary (Kinloch) made great avizandum to the First Division.

JOHN M'LAREN and W. MACINTOSH were heard for the pursuers, and cited Laing v. Bruce, 20th November 1838, 1 D. 59.

FRASER and SCOTT for the defender supported their plea of insufficient specification. They did not dispute the relevancy.

The Court closed the record, and (Lord Curriehill, *dubitante*) allowed the parties a proof before answer of their respective averments.

Agent for Pursuers—J. D. Wormald, W.S.

Agent for Defender—John Galletly, S.S.C.

SECOND DIVISION.

WESTERN BANK OF SCOTLAND AND LIQUIDATOR v. BAIRD.

Bank—Negligence—Enumerated Causes—Issues—Jury Trial. In an action of damages at the instance of a bank and its liquidator against two former directors of the bank, concluding for payment of two specific sums, being the amount of loss sustained by the bank through their malversation of office, and in which the Lord Ordinary had appointed the pursuers to lodge issues—Held that the action was not one of damages and was not one of the enumerated causes, and a remit made to an accountant to report on the books of the bank before sending to the jury the question of the defenders' negligence.

These were two actions at the instance of the Western Bank and its liquidator against the defenders, who were for some time directors of the bank, concluding for the sums of £299,736, 7s. 6d. and £863,618, 9s. 2d. respectively, being the amounts alleged to have been lost in the period of their management as directors, through fault upon their part. The losses were said to have mainly arisen—(1) by improper and imprudent advances on current accounts; (2) by the reckless discounting of bills; and (3) by the establishment of an unauthorised bank agency in America, and through policies of insurance, improperly effected on the lives of debtors of the bank. A compromise between the bank and other directors was entered into in 1861. Upon this compromise the defenders pleaded that it was a bar to the action, and that it was so separately, on the ground that the pursuers, by accepting it, had excluded the defenders from their claim of relief. It was further maintained that there was no relevant allegation of negligence on the part of the defenders.

The following are the pleas in law for the defenders in the action against Mr William Baird's representatives:—

1. The pursuers have no title to sue.

2. Having regard to the character and nature of the former action raised at the instance of the Western Bank and the liquidators of the said bank, and the grounds thereof, the compromises, or settlements, discharges, and decree of absolver, referred to in the preceding statement, amount in law to a compromise or settlement and

discharge of the whole claims made in the present action, and the same cannot now be insisted in or maintained to any extent or effect against the defenders. *Separatim*, The action cannot be maintained, because by the said compromises, or settlements, discharges, and decree of absolver, the pursuer, have extinguished or prejudiced the claims of relief otherwise competent to the defender.

3. The late William Baird was never legally elected a director of the bank, nor entitled to hold office as such during any part of the period libelled, and his representatives are not responsible for any transactions, except those of which he was personally cognisant, and in which he took part.

4. The said William Baird was not responsible for any transactions which took place subsequently to May 1848, nor for any losses which arose on those transactions.

5. The claim made in the present action is excluded by the 31st section of the Contract of Co-partnery.

6. The claims of the pursuers under the present action are excluded (1) by *mora*, and (2) by acquiescence and adoption.

7. The averments made by the pursuers are irrelevant and insufficient in law to support the conclusions of the summons.

8. The averments of the pursuers are not sufficiently specific to entitle the pursuers to have these remitted to probation.

9. The defenders are entitled to *absolver*, or the action should be dismissed, in respect—(1) That there is no specification of the advances through which loss is said to have been sustained; (2) that there is no allegation that such advances were made by the late Mr Baird or with his knowledge; (3) that there is no specification, or at least no sufficient specification, of the alleged losses, or of the cause of these losses; (4) that there is on relevant allegation of any gross negligence on the part of the late Mr Baird; and (5) that there is no relevant allegation that the alleged losses were caused by any such negligence.

10. The defenders are entitled to *absolver*, or the action ought to be dismissed, in respect the loss and damage alleged were not occasioned, and are not by the pursuers relevantly or sufficiently averred to have been occasioned, by the late Mr Baird, or by any person for whom he was in law responsible.

11. The sums credited in the accounts of the respective persons or companies and firms mentioned in the consdescendence and schedules fall to be imputed in extinction of sums debited therein in order of their dates.

12. The averments of the pursuers being contradicted by the books of the bank, the defenders are entitled to *absolver*.

13. The averments of the pursuers being unfounded in fact, the defenders are entitled to *absolver*.

14. No losses having been sustained by the bank during the period during which the late Mr Baird is alleged to have been a director of the bank, his trustees and executors are entitled to *absolver*.

15. The conclusion for interest is untenable, in respect interest is not due upon damages from any date prior to their being found due, and the amount assessed and fixed.

The pursuer's pleas were stated as follows:—

1. The pursuers having sustained loss and damage to the extent concluded for, through gross neglect of duty on the part of the said William Baird, as an ordinary director of the bank, under