

Wednesday, Nov. 29.

SECOND DIVISION.

R. N.—T. D. DOUGLAS, ETC. (MRS C. DOUGLAS' TRUSTEES) *v.* MRS JANET SUTHERLAND AND HUSBAND.

*Trust Settlement—Legacy—Clause—Construction—Conditional Institution.* Held that a legacy to E. S., exclusive of her husband's *jus mariti*, the liferent of which was to be enjoyed by the husband in the event of his surviving his wife, and which upon his death was to go to the heirs of the wife, had not lapsed by E. S. having predeceased the trustor, but was claimable by her only surviving child, in respect the bequest to the heirs of the wife was a conditional institution and not a substitution. (2) Held that there is a presumption in law in favour of conditional institution in such bequests.

Counsel for the Reclaimers—Mr Patton and Mr H. Smith. Agents—Messrs Tods, Murray, & Jamieson, W.S.

Counsel for the Respondents—Mr Gordon and Mr Muirhead. Agent—Mr Forman, W.S.

By her trust disposition and settlement the late Mrs Cecilia Douglas conveyed her property to trustees for certain purposes, and *inter alia* directed them to assign, convey, and make over the proportion of certain debts therein mentioned, to the extent of £1000 sterling, to Mrs Esther Sutherland, wife of Alexander Sutherland, "declaring that the said sum shall, upon no account or pretence whatever, fall under, or be in any degree subject to the *jus mariti* of the said Alexander Sutherland, or under his control and management, nor be liable to nor affected by his debts or deeds, or the diligence of his creditors, the said sum being to remain as an alimentary fund free of any such debts and deeds; and in the event of the said Alexander Sutherland surviving his said wife he shall be entitled to enjoy the interest of the said sum during his life, and upon his death it shall go to the heirs of his said wife: which declaration my said trustees are requested to carry into effect." Mrs Esther Sutherland died in 1850, having been predeceased by her husband. They left two children, Janet and Robert Sutherland. The trustor survived till 1862. Robert Sutherland is said to have predeceased the testatrix. Thereafter Janet Sutherland and her husband raised the present action against the trustees of Mrs Douglas for payment of the foresaid sum of £1000. The trustees resist the action upon the plea that the direction to assign the £1000 has lapsed by Mrs Esther Sutherland having predeceased the trustor. The case having come to depend before Lord Jarviswoode, his Lordship held that in the events which have occurred an effectual direction was constituted to convey and make over the proportion of debts to the extent of £1000 to the heirs of Esther Sutherland, with interest since the death of the trustor. Against this judgment the trustees reclaimed. After hearing counsel to-day the Court adhered.

The LORD JUSTICE-CLERK said—I have no doubt, in the first place, that this legacy was left to Mrs Esther Sutherland in fee, and the whole question is as to the construction of the words which follow the bequest—whether they were intended, in the event of her predeceasing the trustor, to provide a conditional institution in favour of her heirs, subject to a liferent in favour of her husband, if he should survive her; or whether they were intended only to come into operation in the event of Mrs Sutherland taking and dying, and leaving her husband the liferent. I am disposed to adopt the former construction. There is a presumption in law in favour of conditional institution rather than of substitution in bequests such as the present, and I do not see

such great difficulty in interpreting the deed so as to give effect to the legal presumption as to induce me to disregard it. The view I take of the matter is this. A legacy is given to Mrs Sutherland, which if she takes she takes absolutely—the *jus mariti* of her husband being excluded—and she having an absolute power of disposal. If she does not dispose of it, and the fund remain, it will still go upon her death to her heirs under the burden of a liferent in favour of her husband if he survives her. If she predeceased the trustor, there was still a conditional institution of a liferent to her husband and a fee to her heirs.

The other Judges concurred.

Friday, Dec. 1.

FIRST DIVISION.

PETITION—BLOCHAIRN IRON CO. *v.* P. FLOWER AND CO.

*Diligence—Inhibition—Recall—Expenses.* A party who is extrajudicially asked to consent to the discharge of an inhibition, and declines to do so, is liable in the expense of an application to the Court for recall.

Counsel for Petitioners—Mr MacLean. Agent—Mr John Ross, S.S.C.

Counsel for Respondents—Mr J. G. Smith. Agents—Messrs Gibson-Craig, Dalziel, & Brodies, W.S.

These parties have counter actions depending against each other in the Outer House. Flower & Co. sometime ago arrested funds belonging to the petitioners in the hands of several parties, and on 23d February 1865 they also executed and recorded letters of inhibition against the petitioners. On 3d March the petitioners applied for and obtained letters of general loosing of arrestments on finding sufficient caution *judicatum solvi*. The petitioners thereupon applied to the agents for Flower & Co. to discharge the inhibition in respect caution had been found, but this they declined to do. This application was therefore made for recall of the inhibition. No answers were lodged, and the only question was that of expenses.

The Court, in respect the respondents had declined to discharge the inhibition when asked to do so, recalled the inhibition, and found them liable in expenses.

SECOND DIVISION.

BALLANTYNE *v.* WRIGHT OR WINTHROP.

*Husband and Wife—Nullity of Marriage—Aliment and Expenses pendente lite.* After a Lord Ordinary has pronounced decree of nullity of marriage at the instance of a husband, the defender is not entitled to interim aliment and expenses from the pursuer.

Counsel for the Defender—Mr W. M. Thomson. Agent—Mr Crawford, S.S.C.

Counsel for the Pursuer—Mr Strachan. Agent—Mr Ross, S.S.C.

This is an action of declarator of nullity of marriage, entered into in 1856 between the pursuer and defender. The pursuer is the husband; and he alleges that the defender was previously, and in 1840, regularly married to another man, who is still alive. The Lord Ordinary (Barcaple) found the libel proved; and decreed and declared in terms of its conclusions, and the defender reclaimed. The case was in the roll to-day on a motion for the defender that she should be allowed aliment and costs to enable her to prosecute her defence to a conclusion.

Mr W. M. THOMSON, who appeared for the defender, admitted that he was unable to quote authority in