

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

the law of Scotland in support of the motion, but he relied on two English cases. He further maintained that the marriage between the pursuer and defender being regular, there was a presumption of law in its favour until it was finally set aside.

The Court refused the motion, the LORD JUSTICE-CLERK observing that he would like to hear argument before holding that such a motion was competent, but he had no difficulty in disposing of it in the circumstances of this case. To grant the motion would just be setting the Lord Ordinary's interlocutor at defiance without inquiring into the grounds upon which it proceeded.

LORD NEAVES said he could quite conceive the existence of circumstances in which, so long as the woman was *in possessio*, she might prefer a claim for aliment, but as the Lord Ordinary had declared the marriage to be null, the case that he had in view did not arise.

ADV.—CLARK *v.* KINLOCH—*ante*, p. 40.

*Reparation — Culpa — Road Surveyor.* Circumstances in which a road surveyor held not liable in damages for injuries suffered by a passenger along a road, in respect the injuries were not caused by failure in the discharge of any duty imposed on him either by statute or common law.

Counsel for the Pursuer (Respondent)—Mr Scott and Mr F. W. Clark. Agent—Mr Bridgeford, S.S.C.

Counsel for the Defender (Advocator)—The Lord Advocate and Mr Moncreiff. Agents—Messrs Burn, Wilson, & Burn, W.S.

This case, which we reported at the time of its hearing, and which involves a claim of damages at the instance of a woman, with concurrence of her husband, for injuries sustained through falling into a hole on the Shotts turnpike road, was to-day advised. The Sheriff, reversing the judgment of the Sheriff-Substitute, had found the defender (who is surveyor of the road) liable in damages, which he assessed at £50.

The LORD JUSTICE-CLERK said—This is a case of some general importance. But the chief difficulty is to ascertain precisely what the state of the fact is. I will endeavour to state the facts which I think are proved, and on which my judgment proceeds. The pursuer and her husband were walking along the footpath on the north side of the turnpike road in October last, between seven and eight in a dark and misty evening. The footpath was next to the turnpike road, and the wife was on the north side and off the road. The footpath was generally about 12 or 13 feet wide, but at a particular place near a smithy it suddenly contracted, so that the level space on the footpath was reduced to three or three and a half feet. This had been caused by the turnpike road having been there raised above the natural level of the ground by the necessity of having a cart entrance from the turnpike road so raised to certain houses adjoining, which were built at a lower level. That cart entrance ran for some time parallel to the footpath and to the north, and it seems to have been the formation of the cart entrance that caused the narrowing of the footpath from between 12 and 13 feet down to between 3 and 3½ feet. This operation was probably coeval with the raising of the level of the turnpike road. At all events, however this may be, the raising of the level of the turnpike road and the formation of the cart entrance were all before the defender had become surveyor of the road. Now it appears to me that it was on account of the sudden contraction of the width of the footpath that the pursuer, in the dark, perhaps unaware of it, walking on the north side, suddenly came on that part of the footpath where it entirely disappeared, slid down the slope, and broke one of the bones of her leg. It appears to me that the accident was probably caused by the manner in which the footpath was there contracted. It is not

proved to be due to any other circumstances. I think the accident was caused by malconstruction of the road, not by its being out of repair. Now that being the state of the fact, the question is, whether the pursuer is entitled to recover damages in reparation of her injury from the defender, who is the surveyor of the road, on the ground that he had a duty in regard to the footpath to perform, in which he failed, and, in consequence of which failure the injury was sustained. The duty of maintaining turnpike roads is vested by Acts of Parliament in the trustees of the roads. They are charged by general and by local Acts with the general duty of maintaining and repairing turnpike roads, and special duties by certain clauses of the General Turnpike Act, and particularly by the 82d, are laid upon them. (His Lordship quoted the terms of the section, which provides that trustees may make and keep in repair a footpath along the road, and that within two miles of every town or burgh having a population of 2000 a footpath must be made and kept in repair, and provides a remedy for being compelled to do so.) Now, whether this footpath is referred to one or other of the categories mentioned in this section is of no importance. If under the latter, the trustees were bound to make and keep it in repair; if under the latter, when made, they were bound to keep it in repair. In either case the obligation to keep the footpath in repair is laid by the Act on the trustees. There are sections of the statute which also lay particular duties on trustees, the 94th, for example. (His Lordship quoted the terms of the section, which provides that trustees shall erect parapet walls along bridges, embankments, &c., at dangerous places of the road, and action is given to the procurator-fiscal to compel them to do so.) Here, again, if any protection was necessary at this part of the footpath, the duty of providing it is laid by the statute on the trustees; and with reference to their duty in these respects, and all other duties, a very summary and effective remedy is given to all persons, under the 117th section, which is found very efficient in compelling trustees to do their duty. The duty thus laid on trustees being to keep the road in repair generally, and also the footpath, and to provide all kinds of securities against accidents, the question is, whether this statutory obligation is imposed also on the surveyor, the defender? Now, that may be considered in two points of view. The surveyor is the servant of the trustees independently of any provision of the Act of Parliament, and there may be cases where a master may delegate the performance of his own duty to a servant, such as a foreman, in which, being a superior servant of that kind, I am not prepared to say that the master would not be liable. But if this is to be considered a question at common law, we must look to see the employment or contract between the road trustees and the surveyor. On the other hand, if it is said that the duty of the surveyor which he violated was a statutory one, then he must examine the clauses of the Act to find the grounds of liability. As regards the employment, apart from the statute, we have that distinctly stated in the evidence of Mr Moncreiff, clerk to the trustees. (His Lordship quoted Mr Moncreiff's evidence, to the effect that the duty of the surveyor is to superintend contractors on the road, and to look after surfacemen, and he has no other; further, that no instructions had been given to him in regard to that part of the road where the accident happened; and that since he was appointed surveyor the place had not been altered.) Now, what is the nature of this employment? It is a supervision of contractors in the performance of their contracts—contractors with the trustees, the surveyor himself not being a party to the contract. But the surveyor, so far as I can see, has no power to employ men as his servants. He is in no independent position, like a person with a contract of his own. He is in no other sense different from the ordinary servants of the