

as settling that a judicial sale could not take place whilst the Court were not sitting.

The Court, holding that delay would cause additional expense, and that the only reason for such a sale not taking place during a recess of the Court was one of expediency, gave a special warrant for the sale taking place on the day fixed before the Lord Ordinary on the Bills.

Agent for Petitioner—Andrew Hill, W.S.

Tuesday, January 25.

**FERGUSON v. HIS NEXT OF KIN.**

*Curator—Deed of Nomination—Minor.* Deed of nomination by a minor of a curator resident in England, who offered to find caution to any amount required, and to give any necessary guarantee for his appearance in Court when called on, and to prorogate its jurisdiction for the purposes of the curatory, *refused*, in respect of no necessity shewn.

Robert Cutlar Fergusson of Craigdarroch, in the the county of Dumfries, and of Orroland in the stewardry of Kirkcudbright, sought to have Major Dormer, residing at Craigdarroch House in the county of Dumfries, and at No. 6 Prince of Wales' Terrace, Kensington, London, decerned curator to him. On the maternal side, the nearest of kin to the pursuer, major and resident in Scotland, were his mother, now the wife of Major Dormer, and her brothers, Colonel Sir Archibald Alison, Bart., and Major Alison; while on the paternal side, the only next of kin who was major, was, so far as the pursuer knew, Madame Forcade de la Roquette, wife of the French Minister of the Interior, and resident in France. A deed of nomination in favour of Major Dormer was executed; but as the Lord Ordinary (BARCAPLE) expressed doubts as to the approval of the deed of nomination, Major Dormer offered to bind himself to find caution in Scotland to any amount which might be required, and also to give such guarantee as might be deemed necessary that he would appear in Court to answer for his conduct as curator, or to find additional caution at any time that he might be called on to do so, and to submit himself to, and to prorogate the jurisdiction of, the Court of Session for the purposes of the curatory, and to assign a place in Scotland at which he might be cited. The Lord Ordinary reported the case to the Inner House.

SOLICITOR-GENERAL and ORR PATERSON quoted the case of *Lord Macdonald v. His Next of Kin*, June 11, 1864, as a precedent for approving of the nomination.

The Court held that no such necessity had been shewn as would justify the appointment of a curator resident in England.

Agents for Pursuer—H. & A. Inglis, W.S.

Tuesday, January 25.

**OGILVIE'S TRUSTEES & OTHERS v. MILLER.**

*Revocation—Residue—Intestacy—Expenses.* By his trust-disposition a trustee appointed his widow residuary legatee. By a codicil he revoked certain bequests and made his brother James residuary legatee if he survived him and his widow. James survived the trustee, but not the

widow. *Held* that the bequest of the residue to the widow was not revoked, that there was no intestacy as regarded it, and that the unsuccessful claimant must bear the expenses of the case.

This was a special case presented by the trustees of the late Major General Ogilvie and some of the beneficiaries under his trust-deed to have their rights determined. The trust-deed conveyed all the truster's heritable and moveable estate to trustees for certain purposes. Mrs Helen Allan or Ogilvie, his wife, was, in the event of her surviving him, to get all his household furniture, bed and table linen, plate, books, and wines and spirits in his cellars, and a liferent of his whole trust-estate. By the third purpose the truster directed, on the death of Mrs Ogilvie, if she survived him, that the trust-estate should be realised, and certain legacies paid to his half-sisters Isobel and Margaret, and Barbara, the daughter of his half-brother Thomas; £3000 in Bank of Bengal stock to his half-brother James; and the lands of Blackford conveyed to his half-brother Archibald: it being declared that if the trust-estate was not sufficient to meet the three first legacies, certain specific diminutions were to be made on the two last, or the trust-estate divided in a different manner as therein specified; but if after payment of the legacies there was any residue it was to go to the widow, to be disposed of by her as she might think proper. It was also declared that any codicil he might make should be held part of his trust-deed. He executed such a codicil, and by it revoked the bequeathments to his half-sisters Isobel and Margaret, and changed the destination of his niece Barbara's legacy. The codicil went on to say:—"I confirm the bequests in the will to my half-brothers James and Archibald, with the addition that if the said James shall survive myself and spouse he shall be considered my residuary legatee not only of bank shares but of all other property; also, that if the surplus of my personal property after paying all other legacies shall exceed Twelve thousand pounds sterling, he shall pay to his brother Archibald or his heirs such amount as, added to the assumed valuation of Blackford, &c. (if unsold by me), shall make his share up to Six thousand pounds. But if the aforesaid surplus do not exceed Twelve thousand pounds, then its amount shall be added to the assumed value of Blackford, &c., and the aggregate sum divided into five parts, three of which shall fall to James, and two to Archibald. In any case Blackford, &c., if unsold, is to be part of the portion of the latter at the assumed value of Two thousand seven hundred pounds sterling. I further authorize my wife Helen, if she survive me, to alienate by gift, or bequeath by will, any portion or portions of my personal or moveable property of which she is to enjoy the use or income, not exceeding in all Three thousand pounds sterling, and she may include plate, furniture, &c., at a valuation, but it shall be optional with my surviving executors or executor to pay cash instead."

The truster died on 20th September 1847, survived by his widow. James Ogilvie predeceased her on 21st July 1865, leaving six children; and on 24th March 1866 she executed an assignation by which, on the narrative of her desire to fulfil what her husband intended, she conveyed to trustees the whole residue provided to her under her husband's trust-disposition, directing them, after payment of her debts, &c., and her husband's legacy of £6000

to Archibald, to pay the remainder to and in favour of James' children. She, however, retained her right to bequeath or alienate any part of the trust-estate to the extent of £3000.

Major-General Ogilvie's next of kin at his death were Archibald and James and Isobel, wife of Mr Miller of Leithen. The trust-estate was computed to amount to upwards of £25,000, and after deduction of the undisputed legacies to upwards of £9000, and of the disputed legacy to Archibald of £3300, to nearly £6000. The value of the estate as at May 1868 was estimated at upwards of £42,000. The opinion of the Court was asked on the questions,—Whether Mrs Miller was entitled to one-third of the residue as next of kin, on the ground that under the codicil the provisions to the widow were to be held as revoked? and Whether, in that event, Archibald was entitled to his legacy under the codicil?

FRASER and WATSON, for Mrs Miller, argued—Under the trust-disposition the widow is residuary legatee. But the codicil must be read as implying a revocation of this appointment. And as James did not survive the widow, the residue must be treated as intestate succession. Archibald is not entitled to the legacy given to him by the codicil, because he was only to take if James took.

SOLICITOR-GENERAL and MONRO in answer.

The Court held that, as James had predeceased the widow, the codicil was not to be read as revoking the bequest of the residue in her favour.

SOLICITOR-GENERAL having asked for expenses, WATSON argued—This is not a case for expenses. If a multiplepounding had been brought the trustees would have got the expenses of raising the action out of the trust-estate; and the expense of a claim in a multiplepounding would be much greater than a special case.

The Court gave expenses, observing that under this special case the trustees did not get decree of exoneration, and if Mrs Miller chose this form of action she must abide the consequence of failure.

Agent for Mrs Miller and Husband—Stuart Neilson, W.S.

Agent for Trustees and Others—James Renton, S.S.C.

Tuesday, January 25.

## SECOND DIVISION.

### MACDONALD v. MALCOLM.

*Pounding—Ownership of Goods—Nexus.* Held that certain nets, of which the owner had allowed another party the use, could not be attached while in the possession of the latter for a debt due by him, so as to lay any *nexus* on them; and the owner, who had taken possession of the nets at his own hand, protected against a petition brought for restoration of the nets and penalties of breach of pouncing.

This was an appeal from the Sheriff-court of Caithness in two conjoined petitions relative to the pouncing of certain nets. The appellant had pounced nets in the possession of a party against whom he held a small-debt decree. The respondent, to whom the nets belonged, and who had merely hired them to the appellant's debtor, carried them off, or got them carried off, in disregard of the pouncing. The appellant therefore presented a petition to the Sheriff, craving restoration of the nets, and that the respondent should

forfeit double the appraised value. The respondent presented a cross petition, craving interdict against the appellant in any way interfering with the nets.

The two petitions having been conjoined and a proof led, the Sheriff-Substitute (RUSSELL) pronounced the following interlocutor:—"The Sheriff-Substitute having resumed consideration of the conjoined applications, with the writs produced, proof adduced, heard parties' procurators, and advised the cause: Finds that the petitioner Murdoch Macdonald was employed by the respondent Angus M'Leod as a hired hand during the fishing here, from July to September 1868; and at the end of the fishing there was a balance of wages due to him of £5, 16s. 6d.: Finds that, during the said fishing, the said Angus M'Leod was the owner of the boat and drift of nets used in the fishing; and that, during the fishing season in the present year, the said Angus M'Leod continued to use the boat and drift of nets as the ostensible owner thereof: Finds that, upon the 27th of July last, the said Murdoch Macdonald obtained a decree in the Sheriff Small Debt Court against the said Angus M'Leod for the balance of wages aforesaid; and that, upon the 28th of August last, he caused James Weir, sheriff-officer, to poind seven nets, as the property of the said Angus M'Leod, and that a pouncing was executed accordingly: Finds that, in the knowledge of the said pouncing, Alexander Malcolm, fishcurer in Pultneytown, directed the said Angus M'Leod to remove the nets so pounced from the ground rented by the said Angus M'Leod, on which the officer had attached them, and to carry them to the store of the said Alexander Malcolm; and the said Angus M'Leod also, in the knowledge of the said pouncing, removed the nets to said store, where the same were detained or used by the said Alexander Malcolm and Angus M'Leod: Finds that the said Murdoch Macdonald presented the complaint, setting forth the breach of pouncing, and for restoration of the nets: Finds that, whatever might be the claims of the said Alexander Malcolm in relation to these nets, his procedure in the removal thereof, at his own hand, was highly reprehensible, and therefore, in so far sustains the complaint, and Finds the said Alexander Malcolm and Angus M'Leod liable in the expenses of process applicable to the said complaint, and remits the account, when lodged, to Mr Bisset to tax and report: *separatim*, Finds that the said Alexander Malcolm, after removal and disposal of the said nets, presented the application for interdict against the said Murdoch Macdonald interfering with, or selling the said nets, on the allegation that the nets were the property of him, the said Alexander Malcolm: Finds it established that the said nets had, *inter alia*, been acquired for an onerous cause by the said Alexander Malcolm from the said Angus M'Leod previously to or during the currency of the last fishing; and that the said Angus M'Leod was in possession of the said nets solely as having received them on 'deal' for a stipulated consideration of £20 or thereby, payable to Malcolm as owner, and therefore sustains the application, and perpetuates the interdict formerly granted; but in respect of the censurable conduct of the said Alexander Malcolm, above referred to, Finds no expenses due; and decerns."

Both parties appealed to the Sheriff (FORDYCKE) who pronounced the following interlocutor:—"The Sheriff having considered this case on the appeals of the parties respectively, and having