

do it, but if the same issue will try both causes there will be conjunction. These appear to me to be the considerations that ought to influence the Court, and now let us see what the contingency between these processes is, and what is the issue which they raise. The object of the first action, as its conclusions clearly show, is to have it found and declared that the pursuers as riparian proprietors are entitled to the use of the water in a pure state fit for the consumption of man and beast, and that the defenders are not entitled to convert it from a pure state into a polluted one. The second conclusion of the action prays for a prohibition against their doing so. That is all the action, because it is not necessary to try the subsidiary questions by a separate issue before the jury. The conclusions of the two new actions are exactly the same, and therefore the main question, and the only question is, whether the defenders have caused the pollution of the stream to the nuisance of the pursuers? It appears to me that all considerations of expediency are in favour of the conjunction of these processes, that one jury may dispose of the question in presence of all the parties.

The other Judges concurred.

The motion for conjunction was accordingly granted, and the pursuers were appointed to lodge issues.

POTTER v. POTTER.

Proof—Payment of Money. An allegation that a legacy of £100 had been paid can only be proved by writ or oath.

Counsel for the Pursuer—The Lord Advocate and Mr H. J. Moncreiff. Agent—Mr A. D. Murphy, S.S.C.

Counsel for the Defender—Mr A. R. Clark and Mr Deas. Agents—Messrs Duncan & Dewar, W.S.

This is an action for payment of a legacy of £100 claimed as having been left by the late John Potter, shipmaster in Limekilns, to the pursuer, who is his grandson. The action is founded on John Potter's disposition and settlement, dated the 14th January 1843, and is directed against the defenders as executors confirmed to James Potter, nephew of the testator, or at least as having viciously intromitted with and taken possession of his whole means and estate. In answer to the claim the defenders state that on 15th May 1853 the pursuer being desirous of setting up in business, a sum of £100 to enable him to do so was paid by his uncle, James Potter, as the legacy due to him under his grandfather's settlement. James Potter was sole executor under John Potter's settlement, intromitted with his estate, and is now dead.

On 23d November 1864 the Lord Ordinary (Kinloch) found that the defender had not proved or offered relevant and sufficient evidence to prove payment of the legacy sued for, and repelled the defences, reserving to the defender all competent reference to the oath of the pursuer. The Lord Ordinary held it was incompetent for the defenders to prove by parole evidence the alleged fact of the amount of the legacy having been paid to the pursuer. On advising a reclaiming-note for the defender, the Second Division, on 19th January 1865, opened up the record, and remitted to the Lord Ordinary to appoint parties to revise and adjust their statements respectively, and thereafter to close the record, and to proceed with the cause. On reconsidering the case the Lord Ordinary again found that the defender had not proved payment of the legacy sued for by the writ of the pursuer, and is not entitled to obtain an allowance of parole evidence in proof of the allegations made by him towards instructing payment; and of new repelled the defences. To-day the Court unanimously adhered, but received a minute tendered by the defender, referring the alleged payment of the legacy to the oath of the pursuer.

DONALDSON'S TRUSTEES v. MACDOUGALL.

Trust Deed—Construction. Terms of a trust deed under which held (alt. Lord Kinloch), (1) That a liferent had lapsed; and (2) That the fee should be distributed *per capita* and not *per stirpes*.

Counsel for Mr J. Lawford Young—Mr Patton and Mr Cook. Agents—Messrs Thomson & Dickson, W.S.

Counsel for Lieut. Macdougall and Others—Mr Gordon and Mr Duncan. Agents—Messrs Adam, Kirk, & Robertson, W.S.

This case has been on several occasions before the Court. The questions now in controversy regard the meaning of a clause in the third codicil to the late Mr Donaldson's settlement. By the previous parts of that settlement, as construed by the judgment of the House of Lords, the residue of Mr Donaldson's estate was given to certain grand-nephews and grand-nieces, subject to the condition that if any of these died without issue before the testator's widow, by whom the whole estate was liferented, the share of such deceiver "shall belong to and be divided equally, or share and share alike, among the survivors of my said grand-nephews and grand-nieces equally." By the third codicil Mr Donaldson, to some extent, altered this provision as regarded grand-nieces, and appointed his trustees "to pay the share or shares bequeathed to my said grand-nieces in or by the foresaid deed of settlement to them and their respective husbands only in liferent, for their, her, or his liferent use alienarily, and the fee of such shares to the lawful issue of my said grand-nieces equally; whom failing, to the survivors of them, and my grand-nephews, also named in the foregoing settlement or codicils, equally in liferent, and their issue, also equally in fee, after the death of the longest liver of me and my wife."

The present process regards the one-sixth share bequeathed to the testator's grand-niece, Eliza Young or Cuthbertson, wife of Allan Cuthbertson. Mrs Cuthbertson predeceased the testator's widow without leaving issue, but survived by her husband, Mr Allan Cuthbertson. By judgment of the Inner House, of 15th January 1864, it was found "that Mrs Eliza Cuthbertson having predeceased the testator's widow, leaving no issue, but survived by her husband, the claimant, Allan Cuthbertson, the said Allan Cuthbertson is entitled to a liferent use and enjoyment of the fund *in medio*." The judgment further found that the fee of the said fund belongs to the issue of the testator's grand-nephews and grand-nieces existing at the date of the widow's death, whether their parents survived that term or not." Mr Allan Cuthbertson survived this interlocutor only four days, having died on 19th Jan. 1864. By this event the liferent of the fund terminated; and two questions thereon arise (1)—Whether the fee opened to the parties in right of it unburdened with any further liferent? and (2) whether the right of fee, found by the Inner House to belong to the issue of the whole grand-nephews and grand-nieces, was divisible *per stirpes* or *per capita*. In regard to the first question, the Lord Ordinary (Kinloch) was of opinion that on the death of Mr Cuthbertson a liferent of the fund in question emerged to the three surviving grand-nieces and grand-nephews equally among them; but in the case of the grand-nieces, he did not think the liferent passed to their husbands on their deaths, the provision to that effect applicable to an original being omitted in regard to a devolved share. In regard to the second question, the Lord Ordinary held that the fee was divisible *per stirpes*.

To-day the Court altered this interlocutor, and held that the liferent had lapsed, and that the division of the fee should be *per capita*.

The LORD JUSTICE-CLERK said—In disposing of the two questions which are raised by these reclaiming notes, we must have regard specially to the judgment which has been already pronounced in this process, and also in the previous process, regard-