

LORD NEAVES—I have no fault to find with the proposition that a proprietor in possession of subjects disposed in security cannot always be removed at once by a heritable creditor, or that his possession as owner cannot at once be converted into possession as tenant. But there is no doubt that he *may* become tenant, and the question whether he has done so or not is one of facts and circumstances. In this case the defender took no objection to the notarial intimation that he was to be held as tenant, and he paid his rents, first under decree and then voluntarily. I am of opinion that by so doing he then accepted the position of tenant, and that he still is tenant. A party may insist on retaining his original possession as radical proprietor, but when once he becomes tenant he cannot go back.

LORDS ORMDALE and GIFFORD concurred.

The Court sustained the appeal, and gave decree in favour of the pursuer, with expenses.

Counsel for the Appellant—Dean of Faculty (Clark), and Mr Mair. Agents—Macnaughton & Finlay, W.S.

Counsel for the Respondent—Mr Macdonald and Mr Darling. Agent—Adam Shiell, S.S.C.

Friday, March 12.

## SECOND DIVISION.

### SPECIAL CASE—BLACKWOOD & OTHERS.

#### Succession—Testament.

Circumstances in which the last will of a testator was held cancelled, and a prior will was held confirmed, in accordance with an implied direction to that effect contained in an undated letter which was found along with the two wills in the repositories of the deceased, and which declared that the later will was to take effect only in a certain event, which did not occur.

John Blackwood, surgeon, Catrine, Ayrshire, died in January 1875, unmarried and without issue. He had for many years resided on the most friendly terms with his only brother William, who was also a bachelor. In the repositories of the deceased were found lying together two holograph testaments and a holograph letter addressed to his brother. By the earlier of the testaments, which was dated 15th June 1859, his brother was left sole executor and universal legatory, under burden of payment of debts and a legacy to his servant. The later will was dated 1st September 1871, and by it the deceased appointed John Beveridge and Alexander M'Master his executors, and directed a new distribution of his moveable estate, making no mention of his brother. The holograph letter was undated, and was in these terms:—"Dear Brother, —You will perceive I have made the will very simple instead of entering them as legacies I would wish as soon as convenient to make the following donations from the estate £100 sterling to the Catrine Public School the money to be safely invested and the interest applied annually in giving prizes to the scholars £10 sterling to the Catrine Public Library £5 to the Catrine Funeral Society £5 to the Catrine Mortcloth Society (if distinct) from the Funeral Society £5 to Robert Pollock £10 to Charles Pollock.

"Do not delay making a will for yourself. You may perhaps find another drawn as if I happened to outlive you you can destroy it. I beseech arrange and part calmly with Janet the servant and besides the legacy you will require to pay her wages and give her a suit of mourning. (Signed) JOHN BLACKWOOD."

In these circumstances, the said William Blackwood, brother of the deceased (the first party), and the said John Beveridge and Alexander M'Master (the second parties) asked the opinion and judgment of the Court on the following queries:—" (1) Whether the party of the first part is entitled to administer the moveable estate of the deceased as executor under the testament of 15th June 1859? or, (2) Whether the parties of the second part are entitled to administer said estate as executors under the testament of 1st September 1871? (3) Whether, in the event of the estate falling to be administered by the first party, he will be bound to give effect to the undated letter by the testator before mentioned, and pay the legacies therein set forth? and whether he will be bound to pay the legacies set forth in the testament of 1st September 1871? and in the cases where there are legacies to the same parties both in the said letter and in the testament of September 1871, he will be bound to give effect to the letter or to the said testament, or to both? (4) Whether, in the event of the estate falling to be administered by the parties of the second part, they will be bound to give effect to the undated letter? and in the cases where there are legacies to the same parties both in the testament and in the letter, they will be bound to give effect to the testament or the letter, or to both?"

At advising—

LORD JUSTICE-CLERK—This case turns upon the construction of the holograph letter. There is some difficulty in ascertaining its date and its precise meaning. It plainly alludes to the possibility of two wills being left by the deceased. The will first referred to in the letter is evidently the will first in date, and the letter qualifies it by additional legacies. The legacy left by that will to the servant Janet is implied in the letter, as already made. Then, in the second part of the letter the possibility is referred to of another will being found, "drawn as if I happened to outlive you," and, it is added, "you can destroy it." Is this to be held as a direction to cancel the second will? Clearly that is the only meaning of the words. I am of opinion that the whole holograph letter must be taken as cancelling the second will, and as confirming the first will, and qualifying it by additional legacies.

LORD NEAVES—In the first paragraph of this letter a will *in esse* is referred to. Then, in the second paragraph another will is referred to as at least in contemplation, and is described as drawn on the basis of the testator outliving his brother, which will, the letter says, "you can destroy." He does leave another will, which clearly answers to the description given in the letter, and makes no mention of his brother. The explanation is obvious on this footing, and authority is clearly given to treat this second will as a non-entity.

LORD ORMDALE—Three testamentary writings were left by this testator. The question is—What was his real intention? I construe the holograph letter as tantamount to a declaration in the second

will that it was to take effect only in the event of the testator outliving his brother. This seems to me to be the natural construction of the letter and all the other circumstances of the case are perfectly in coincidence with this view.

LORD GIFFORD—I find no room for doubt in this case. I read the letter as if it had been wrapped round the two wills, declaring that the one will was to take effect in one case, and the other will was to take effect in another case. The expression in the second part of the letter, “drawn as if I happened to outlive you,” clearly means “drawn in such a manner as if I happened to outlive you.” The letter refers to certain donations to be added to the legacy left by the first will to the servant Janet; and it is “worthy of notice that several of the legacies left in the second will are the same as those mentioned in the letter.

The Court pronounced the following interlocutor:—

“The Lords having heard counsel on the Special Case, are of opinion and Find that the party of the first part is entitled to administer the moveable estate of the deceased, as executor under the testament of 15th June 1859, and that he will be bound to give effect to the undated letter by the testator, and to pay the legacies therein set forth, and that he is not bound to pay the legacies set forth in the testament of 1st September 1871; Allow the expenses incurred by the parties to the Special Case to be paid out of the moveable estate of the deceased, and remit to the Auditor to tax the same and to report, and decern.”

Counsel for First party—D. Crichton.—Agents—D. Crawford & J. Y. Guthrie, S.S.C.

Counsel for Second parties—Rankine. Agent—David Milne, S.S.C.

Wednesday, March 17.

## SECOND DIVISION.

BROWN AND OTHERS *v.* SUTHERLAND.

*Bill—Partnership.*

Trustees of a company having accepted a bill drawn on them by a member of a company, in payment of a company's debt, and not having qualified their subscriptions, held individually liable.

Robert Brown, Robert Utterson, and John Smith, trustees of the New Imperial Building Association, and Joseph R. M'All, chairman of the Association, presented a note of suspension against James S. Sutherland, plasterer, also a member of the said Association, who had charged them on a bill for £200.

The following were the circumstances:—On 13th February 1874 a building society was formed, under the name of the New Imperial Building Association. By the fourth head of the Articles of Association, the complainers, Brown, Utterson, and Smith, were appointed trustees for behoof of the Association, and were empowered to sue for and uplift all sums of money due to the Association, and authorised to grant all deeds, writs, or others on its behalf; and all deeds and others granted by the said trustees for behoof

of the Association were declared to be valid and binding on the Association without the concurrence of the other members. By the tenth article the members bound themselves to grant their personal obligation, if required, along with the trustees, in bonds, bills, notes, or other securities.

The respondent James S. Sutherland, who was a member, was employed by the Association to execute the plaster-work of certain buildings in Leith, which they were then erecting. A contract for the plaster-work was entered into between the respondent and R. Thornton Shiells, the architect of the Association, and the respondent was to be paid by instalments as the work proceeded, on the amount from time to time due being certified by the architect.

The respondent proceeded with the work, and on 23d September 1874 he obtained from the architect a certificate that he had executed such portion of the work as to entitle him to payment of the first instalment, amounting to the sum of £200 sterling. In payment of this instalment the bill in question was drawn by the respondent upon and accepted by the complainers. The bill was in the following terms:—‘*Edinburgh, 30th October 1874.*—Two months after date, pay to me or my order, within the British Linen Co. Bank, St Mary Street, Edinburgh, the sum of Two hundred pounds sterling, value received. (Signed) James S. Sutherland, Robert Utterson, John Smith, Robert Brown, Joseph R. M'All.’ It was addressed to ‘Messrs Robert Brown, 10 East Norton Place, Edinburgh, Robert Utterson, contractor, Leith, and John Smith, spirit merchant, Leith, trustees of the Imperial Building Association, and Mr Joseph R. M'All, builder, Lutton Place, Edinburgh.’

The bill was dishonoured when it fell due on 2d January 1875, and the respondent having charged the acceptors to pay the amount of the bill, the complainers presented this note of suspension, and obtained a sist on caution. They failed to find caution, and referred the whole cause to the oath of the charger. The grounds of suspension were, that the acceptors in granting the bill did so merely for the accommodation of the respondent; that they did not thereby bind themselves as individuals for the amount of the bill, but merely on behalf of, and as representing, the Association, and that the respondent took the bill on that footing; that by his contract with the Association the respondent was not entitled to payment for his work, except by instalments, when the trustees should become possessed of the funds of the Association; and that the respondent being himself a partner of the concern, is not entitled to do diligence upon the bill against his copartners.

The Lord Ordinary (CURRIEBILL) pronounced the following interlocutor:—

“*Edinburgh, 25th February 1875.*—The Lord Ordinary having considered the note of suspension and productions, and the respondents' oath on reference, and heard the counsel for the parties, finds the oath negative of the reference; therefore recalls the sist: Finds the letters and charge orderly proceeded: Refuses the note of suspension, and decerns: Finds the respondent entitled to expenses: Appoints an account thereof to be lodged, and when lodged, remits the same to the Auditor of Court to tax and to report.”

“*Note.*—[After narrating the facts as above].