

Lord Young in thinking that the machinery was ordered and supplied and retained, and the defenders have not shown that it was contrary to the contract, or that there was any deficiency entitling them to reject it. But I am equally satisfied, supposing this doubtful, that there was a special agreement between the parties relating to the way in which the machinery was to be tested. There was to be a week's continuous working. Now, supposing hypothetically that the full week had not expired, and at any time the defenders could say that no opportunity of testing had been given. This proposal still remains to be carried out. It was departed from by the pursuers as matter of form. They say they proposed to send down their own workman to superintend the work on consideration that all disputes should be ended. I think the proposal was accepted, and having been so, the only question comes to be, whether the machinery was satisfactory, and I think it was. But over and above, it was worked by the defenders themselves, and went well till the evening of the seventh day, when it broke down owing to what has been proved to have been a trifling defect.

LORD RUTHERFURD CLARK—I also am of opinion that the judgment should be in favour of the pursuers, and I confess I am disposed to place it on the more general grounds stated by Lord Young. I think it is proved that the machinery which the pursuers supplied to the defenders was conform to contract. There may doubtless be, as in all machinery of this class, from time to time, a likelihood of breakages. These are naturally incident to all machinery which does violent work. But such breakages do not give the purchaser of such machinery a right to reject it. They may doubtless give him a right to require the seller to make good the breakages. I do not say that it is a right which always exists, but if the seller makes good the breakages in such a case the buyer is bound to pay the price of the machinery. Now, this machine was used for some time—it may be said to have been on its trial—and there were a few breakages. At last the hammer broke. It would have cost merely five or six shillings to restore it. But yet the defenders maintain that they are entitled, on account of a breakage which any blacksmith could have easily mended, to return to the seller a machine costing £50 or £60. There is no justification for this. The only possible question would be as to whether the iron rod should be replaced at the pursuers' or the defenders' expense, and considering the value of it is 5s. or 6s., I decline to trouble my mind with a solution of the question. I confess I was a good deal impressed with Mr Baxter's argument until I found out how unimportant was the breakage.

The Court pronounced this interlocutor:—

“Find that the articles, sums, and disbursements enumerated in the account libelled were all delivered, rendered, and made by the pursuers to the defenders at the price specified in the said account, and that the same were according to contract, and have been retained and used by the defenders: Find in law that the defenders are not entitled to reject the articles so retained or any of them, and are liable to the pursuers

for the price thereof, and for the value of said sums, and for the said disbursements: Therefore dismiss the appeal, of new repel the defences, and ordain the defenders to make payment to the pursuers of £102, 17s. 3d.”

Counsel for Pursuers — Dickson — Salvesen.
Agents—Webster, Will, & Ritchie, S.S.C.

Counsel for Defenders—Comrie Thomson—
Baxter. Agent—P. Stevenson, S.S.C.

Tuesday, May 25.

SECOND DIVISION.

JONES AND OTHERS v. PURSEY.

Testament—Confirmation—Executors.

A testator left, besides a disposition of his affairs which had been superseded, two other deeds of settlement, one of which was of doubtful validity. The Court remitted to the Sheriff to issue confirmation in favour of persons named as executors in both these settlements, reserving all questions as to the validity of the settlements.

The late John Gunnell, of Glasgow, died on the 15th January 1885. After his death there were found in his repositories (1) a general disposition and settlement by him dated 9th December 1864; (2) a general disposition and settlement dated 10th September 1875; and (3) a general disposition and settlement dated 10th September 1882. The second of these settlements, which were all holograph of the testator, was signed by him before two witnesses, and by it certain persons were named as trustees. The third—the settlement of 1882—bore to be signed by the testator “before these witnesses,” but it did not bear to be signed by any witnesses. A list of persons named as trustees was appended to it, two of whom were the same as named in the deed of 1875, viz., John Jones junior and Gavin Watson. Acting upon counsel's opinion, that the will of 1882 was “inchoate and ineffectual and of no effect,” and that the will of 1875 regulated the succession, three of the trustees in the deed of 1875, Thomas Jones junior, John Davidson, and Gavin Watson, as surviving and accepting executors named in that will, presented a petition to the Sheriff of Lanarkshire as Commissary for warrant to the Commissary-Clerk to issue confirmation in their favour as executors-nominate of Gunnell.

Intimation of the application was made to the beneficiaries under the settlement of 1882. Mrs Pursey, London, one of the said beneficiaries, lodged objections to confirmation being granted to the petitioners.

A record was made up. On 6th February 1886 the Sheriff-Substitute (SPENS) granted warrant to the Commissary-Clerk to issue confirmation as craved.

“*Note.*—The point which is raised before me is I think a difficult and doubtful one, and I decide the point with great hesitation. Three wills are produced. The last of these is, as indeed all of them are, holograph, and would undoubtedly be binding were it not for the fact that the words ‘before these witnesses’ appear and there are no

witnesses' signatures as named on the document. It is, I think, settled law that a testator may prescribe formalities in addition to those required by law, and that if the document in which these are prescribed does not give effect to what he has laid down for himself, the will will be bad. The leading case is *Naismith v. Hare*, July 27, 1821, 1 Shaw's App. 65, where the House of Lords, reversing the judgment in the Court of Session, held that where a testator had stated on the testament in question 'I hereto set my hand and seal,' and a piece of it which was presumed to have contained the seal was found cut off, the will was inept. The whole question, of course, is one of presumed intention. . . . The presumption, it appears to me is that having prescribed for himself what he believed to be an essential, the testator must be held to have hesitated as to doing that which he thought necessary to make the will a binding deed." . . .

Mrs Elizabeth Pursey appealed to the Sheriff (CLARK) who adhered.

Mrs Pursey appealed to the Second Division of the Court of Session.

The Court pronounced this interlocutor:—

"Recal the interlocutors of the Sheriff-Substitute and of the Sheriff appealed against: Remit to the Sheriff with instructions to issue confirmation in favour of the petitioner J. Jones junior and Gavin Watson as executors-nominate under the wills of 10th September 1875 and 10th September 1882, mentioned in the record, without prejudice to any questions that may be raised as to the validity of the said wills: Find the parties entitled to expenses out of the estate of the testator."

Counsel for Petitioners—M'Clure. Agents—Cairns, M'Intosh, & Morton, W.S.

Counsel for Mrs Pursey—Lorimer—Boyd. Agent—Thomas Hart, L.A.

Wednesday, May 26.

SECOND DIVISION.

[Lord M'Laren, Ordinary.

RANKIN v. WITHER.

Husband and Wife—Donation inter virum et uxorem—Recompense—Meliorations—Whether Meliorations by Husband on Wife's Property will found Claim of Recompense.

The husband of the proprietrix of a house advanced a sum of money for the purpose of making improvements upon it. The result was that the house was entirely reconstructed and greatly increased in value. The house was let and the annual rent was enjoyed by the husband in virtue of his *jus mariti*. The wife died intestate, without issue. Held (1) that the husband was not entitled to any sum as recompense from the heir-at-law who succeeded to the house, although the value of it was greatly increased by the husband's outlay; and (2) that the sum expended by him could not be regarded as a donation which he was entitled to revoke and so recover from the wife's heir.

The late Mrs Mary Wither or Rankin succeeded

under the settlement of her father to a house in Stranraer destined to her and her heirs and assignees. She died in August 1884 without a will, and her heir-at-law, who was her nephew John Wither, succeeded to the house. This was an action by her husband Alexander Rankin for declarator that John Wither was bound to pay him the sums he had disbursed upon the house, or at least to pay him such sums in so far as the house had been ameliorated, his claim being therefore first for repayment, and alternatively for recompense for meliorations. There was a petitory conclusion for £457 as the sum expended, or alternatively for such sums as should be held to be the value of the meliorations.

The facts were, that the pursuer and his wife were married without any contract, and the pursuer had therefore by his *jus mariti* the rents of the house, which was in and prior to 1867 let for £17 annually. It had fallen into very bad repair, and in 1879 the spouses agreed that it should be taken down and rebuilt, which was done by the pursuer at an expense of about £457. After the rebuilding the house was let at £35 a-year. The wife got these rents, but occasionally gave the pursuer part of them, and she also handed over to him a sum of £100. It was the intention of the wife to leave the house to her husband, but she died suddenly without a will.

The pursuer stated that his advances constituted a donation which he now revoked.

He pleaded—“(1) The pursuer having revoked the donation in favour of his wife, is entitled to recover the same from the defender, in so far as he is in enjoyment of that donation. (2) The subjects in question having been meliorated by the pursuer, he is entitled to recover from the defender the value of the meliorations in so far as he is *lucratus* thereby.”

After a proof, in which the facts abovestated were elicited, the Lord Ordinary (M'LAREN) pronounced this interlocutor:—“Finds that the subjects libelled were ameliorated on the order of the pursuer and at his cost, and that the consequent increase in the value of the subjects is not less than £350: Finds that such meliorations were made by the pursuer for his own benefit as a temporary possessor in virtue of his *jus mariti* and right of administration of his wife's property: Finds that the said meliorations became part of the wife's estate by accession, and were not acquired by her under the title of donation: Finds further that the defender is under no obligation to make a compensatory payment to the pursuer for the value of the said meliorations: Therefore assolizies the defender from the conclusions of the action, and decerns: Finds the defender entitled to expenses, &c.

“*Opinion.*—In this case a claim is made by the pursuer against his wife's heir for the whole or part of the sum which he laid out in improving and adding to the value of his wife's heritable estate.

“The claim is made alternatively on the ground of donation or recompense. In the first view the sum claimed is £457. In the second view the sum claimed may be stated as £350. The subject in question is a house in Stranraer, valued at £550, and the claim is for the difference between the present value and the original value (£200) of that house. I do not understand that the parties differ as to the figures which I have