

codicil before mentioned, and the said disposition in their favour, the petitioners, if not fiars, are at any rate fiduciary fiars for their heirs and assignees, and that they are therefore entitled to the benefits of the Trusts Acts. It is provided by section 3 of the Trusts (Scotland) Act 1867 that it shall be competent to the Court of Session on the petition of the trustees under any trust deed to grant authority to the trustees to do any of the following acts, on being satisfied that the same is expedient for the execution of the trust, and not inconsistent with the intention thereof; and the Court shall determine all questions of expenses in relation to such applications, and where it shall be of opinion that the expense of any such application should not be charged against the trust estate, it shall so find in disposing of the application—(1) To sell the trust estate or any part of it. (2) To grant feus or long leases of the heritable estate, or any part of it. (3) To borrow money on the security of the trust estate or any part of it. (4) To excamb any part of the trust estate which is heritable. If the petitioners are fiduciary fiars under the codicil and disposition before mentioned, and as such entitled to the privileges of the Trusts Acts, it appears to me that the expenditure made or proposed to be made is of such a nature as properly falls to be chargeable by trustees against the fee of the estate."

On the case being heard in the Summar Roll, counsel for the petitioners referred to *Cumstie v. Cumstie's Trustees*, June 30, 1876, 3 R. 921, 13 S.L.R. 595.

Counsel for the *curator ad litem* stated that he had no objection to the prayer of the petition being granted.

LORD PRESIDENT—It seems to be clear that questions might arise in regard to the legal construction of the destination here, because there is, *prima facie*, a repugnancy between the gift in "liferent allenary" and the destination to the "heirs and assignees" of the liferenters. The first phrase appears to limit the petitioners' right to a liferent; the second, by giving an unqualified power of disposal, to enlarge it to a fee. But in a process of this kind it is not necessary to decide that question. It is manifestly desirable that the petitioners should obtain the powers they ask, because they cannot help paying the municipal charges, and it is plainly expedient that the vacant ground should be feued. I therefore think that, without pronouncing any judgment on the legal construction of the destination, it is reasonable and proper that we should grant both the power to charge—which seems to be necessary—and the power to feu, which, to say the least, would be highly advantageous.

LORD ADAM concurred.

LORD M'LAREN—The destination in the testator's second codicil raises an interesting question in the chapter of law known as fee and liferent, if the proper parties for determining it were here. At present we are only concerned with the destination for the purpose of seeing whether the Court

may grant the powers which are desired. Looking at the question in that light, if the true construction of the destination of the fee is that suggested by Lord Deas in the case of *Cumstie* (3 R. 921), that "heirs" in this connection should be restricted to children, there might be great difficulty in granting these powers. No doubt counsel for the *curator ad litem* would argue that on the birth of a child the fiduciary fee was at an end. But as the decision of the Court in *Cumstie* was that the words "heirs whomsoever" should receive their ordinary meaning, the difficulty does not arise, because it is plain that the liferenters can have no heirs whomsoever until their death.

I have not much difficulty in holding, for the purposes of this case, that if the petitioners are not fiars, they are fiduciary fiars in trust for their heirs, and are therefore entitled to apply to the Court for reasonable powers of administration. On that ground, as the report is wholly favourable on the merits of the application, I think both the power to charge and the power to feu may be granted.

LORD KINNEAR—I agree that we should grant this application as an act of fair and reasonable administration, but I think we should do so without expressing any opinion on the question whether the right of the petitioners is one of fee or of liferent coupled with a fiduciary fee.

That question may never arise, and if it does it may then be decided in a question between the proper parties.

The Court granted the prayer of the petition.

Counsel for the Petitioner—H. Johnston, K.C.—Pitman. Agents—A. & G. V. Mann, S.S.C.

Counsel for the Curator *ad litem*—M'Lennan.

Saturday, June 14.

SECOND DIVISION.

MILNE v. E. & J. BIRRELL.

Inhibition—Discharge of Inhibition—Demand by Creditor that Debtor should Pay Expenses of both Imposition and Discharge of Inhibition—Expenses of Petition for Recal—Expenses.

A creditor used inhibition in security of his debt, and the debt was thereafter paid. The debtor requested his creditor to discharge the inhibition, and offered to pay the expenses of the discharge. The creditor demanded payment of the expenses not only of discharging but also of laying on the inhibition, and the debtor accordingly presented a petition for recal. The Court granted the prayer of the petition, and found the creditor liable in the expenses of the application and of the removal of the inhibition.

Robertson v. Park, Dobson, & Company, October 20, 1896, 24 R. 30, 34 S.L.R. 3, *followed*.

William Milne, ice merchant, 103 King Street, Glasgow, presented this petition for recal of inhibition used by Messrs E. & J. Birrell, builders, Kinnear Road, Glasgow, and praying the Court "to find the said Messrs E. & J. Birrell liable in the expenses of this application, and of such other expenses as it may be necessary to incur in order to get the incumbrance created by the said inhibition completely removed."

On 18th March 1902 Messrs Birrell had presented a petition in the Sheriff Court at Glasgow for recovery of a debt due to them by Milne. On 21st March they took out and recorded letters of inhibition against him.

Milne had thereafter paid the debt sued for, and the expenses of the petition, which was accordingly abandoned.

On 1st April 1902 Milne, through his agents, requested Messrs Birrell to discharge the inhibition which they had taken out over his property. Messrs Birrell replied through their agents that they thought his proper course was to present a petition to the Court for recal, but stating that they did not object to discharging the inhibition if Milne paid the expenses.

Milne intimated that he was willing to pay the expenses of the discharge, but Messrs Birrell required that he should also pay the expense incurred in taking out and recording the letters of inhibition.

Milne accordingly presented this petition.

Messrs Birrell lodged answers in which they stated that they had no objection to the prayer of the petition being granted, except in so far as it sought to have them found liable in expenses.

Argued for the petitioner—A creditor, having used inhibition in security of his debt, and having received payment of his debt, was not entitled to demand from his debtor the expense not only of discharging but also of laying on the inhibition as a condition of granting the discharge. The petitioner having been compelled to make the present application by the unreasonable attitude adopted by the respondents, they should be found liable in the whole expenses incurred by the petitioner in freeing himself from the inhibition—*Robertson v. Park, Dobson & Company*, October 20, 1896, 24 R. 30, 34 S.L.R. 3.

Argued for the respondents—The position of the respondents with regard to the whole expenses in connection with the inhibition was that of successful litigants. They had obtained payment of their debt, and they were not bound to pay the expenses of their unsuccessful debtor in connection with the steps which they had been obliged to take owing to his non-payment—*Laing v. Muirhead*, January 28, 1868, 6 Macph. 282, 5 S.L.R. 199; *Roy v. Turner*, March 18, 1891, 18 R. 717, 28 S.L.R. 509.

LORD JUSTICE-CLERK—I think we should follow the case of *Robertson*, which, so far as the question before us is concerned, appears to be on all fours with the present case. If there is any practice under which a creditor who has used inhibition in security of a debt which the debtor has there-after paid, is entitled to refuse to discharge the inhibition when the debtor is willing to pay the expense of so doing, it is a most unreasonable practice.

LORD YOUNG and LORD TRAYNER concurred.

LORD MONCREIFF was absent.

The Court pronounced this interlocutor:—

"Recal the inhibition taken out by E. & J. Birrell on 21st March 1902 against the petitioner William Milne: Grant warrant for marking the same as discharged in the Register of Inhibitions, and that upon production of a certified copy of this interlocutor: Find Messrs E. & J. Birrell liable in the expenses of the petition and of any expenses necessarily incurred in having the said inhibition completely removed," &c.

Counsel for the Petitioner—Horne. Agents—Fletcher & Morton, W.S.

Counsel for the Respondents—C. D. Murray. Agents—W. & J. L. Officer, W.S.

Friday, June 13.

SECOND DIVISION.

M'PHERSON'S TRUSTEES v. HILL.

Trust—Succession—Anticipation of Period of Payment—Discharge of Liferent—Fund Vested subject to Partial Defeasance—Presumption as to Child-Bearing—Security Provided for Event of Future Children.

A fund was held by a body of testamentary trustees for a widow in liferent alienarly and for her children on their attaining majority in fee. The liferent was not declared alimentary. The presently existing children of the liferentrix had all attained majority. The liferentrix was now fifty-seven years of age, and her husband had died in 1898, nineteen years after the birth of the youngest child. The liferentrix having offered to renounce and discharge her liferent, the children called upon the trustees to make over the fund to them. The children offered to purchase an annuity for the liferentrix, and the widow and the children offered to discharge the trustees and to obtain and deliver to the trustees a paid-up policy of insurance for the amount of the fund to be held by them for the protection of the interests of any child or children who might be born and attain majority. It was ultimately not disputed that the fund had vested in the presently existing