

one of the heirs *in mobilibus* of her deceased husband.

The Lord Ordinary (BARCAPLE) found "that, according to a sound construction of the deed of directions executed by the truster, James Inglis, on 22d May 1860, the direction therein contained that one-half of the sum of £1600 thereby directed to be invested for behoof of the truster's grandson, James Inglis junior, for his liferent use allanarly, should be divided into two equal parts or shares, one whereof should be payable to or amongst the lawful heirs of the said James Inglis, the liferenter, constituted a bequest or destination of the fee of said half of said sum to the proper heirs *in mobilibus* of the said James Inglis junior, and did not confer any right to any portion thereof upon his widow in the event, which has happened, of his dying survived by a widow."

"*Note.*—The primary question is as to the intention of the truster in the destination of the fee of half of the sum of £1600, which he directed to be invested for behoof of his grandson in liferent allanarly, and the fee 'to be divided into two equal parts or shares, one whereof shall be payable to or amongst the lawful heirs of the said James Inglis, the liferenter.' It is contended for the widow of the liferenter that the truster's intention was merely to tie up the fund so as to prevent it being squandered or dilapidated by his grandson leaving it at his death to go to the parties who would have taken it if it had been moveable property vested in his person, including his widow, if he should leave one. The Lord Ordinary thinks that that construction is excluded by the terms of the provision giving the fund to the lawful heirs of the liferenter. That is, no doubt, a very flexible expression, and one requiring construction in the present case. The Lord Ordinary has no doubt that it must be held to apply to heirs *in mobilibus*, and not to heirs at law in heritage, the direction to invest in heritable or other security being merely for the purpose of securing a fund for payment of the liferent, and the £1600 being directed to be divided and paid by the trustees to the parties to whom the fee was destined. But the widow is not, in any sense, one of the lawful heirs, and the Lord Ordinary does not think she can be held to be included by that description of the parties to whom the fee is bequeathed. The truster may possibly have had the intention for which the widow contends, but there is no evidence of that to be found in the deed, according to any construction which can be legitimately put upon its terms."

Mrs Inglis reclaimed.

SCOTT and BRAND for reclaimer.

Lord Advocate (MONCREIFF) and RETTIE for respondents.

GEBBIE for trustees.

At advising—

LORD PRESIDENT—This case is at first sight clear enough, and I think it is also clear enough after careful consideration. But I am disposed to think that it was quite worthy of serious argument and consideration, for it is concerned with very delicate principles of law. The words of the settlement on which the whole question turns are few and simple. A sum of £1600 is settled on James Inglis in liferent, "for his liferent use allanarly, and after his death the fee of the said sum of £1600 to be divided into two equal parts or shares, one whereof shall be payable to or amongst the lawful heirs of the said James Inglis, the liferenter." Now, the lawful heirs of the said James Inglis may

mean either the heirs *in mobilibus* of James Inglis, the fund being moveable, or it may mean those parties, whoever they may be, who would have taken the fund on the death of James Inglis intestate, if it had been vested in him, as the reclaimer contends. In the latter case the reclaimer is entitled to prevail, for then she would have been entitled to one-half of this sum *jure relictae*, there being no children of the marriage with the deceased James Inglis. The question is, whether a widow, claiming to take her legal rights on the death of her husband, is in any sense an heir of her husband? I am of opinion that she is not. I think, however loosely the term heir may be used in settlements, it never can be understood to comprehend such a right, or the person in such a right, as is possessed by a widow on the death of her husband. The character of heir, of every class, is that of succession to the deceased in respect of a right of blood, but it does not, and never can, involve in any sense or degree a *jus crediti*. As regards the widow's *jus relictae*, she is a creditor, just as the children are creditors for their legitime. She is a creditor in this most important sense, that she is entitled to insist on payment of one-half or one-third of the moveable estate of her husband against his express will, unless previously excluded. Certainly in that sense she could hardly be called an heir, and if her right is of such a nature that she can take it against the express will of the testator, it must be the same when she takes it out of his intestate estate. It has been settled that she claims her *jus relictae* against the executors, and as a matter of debt due by the executor to her. She does not claim to her *jus relictae*, and so it appears to me that there never can be a legal right in her, in respect of her position as widow, that can be properly described as a right of succession. In a popular and loose sense, no doubt, it may be so called. A purchaser is in one sense a successor—he is called a singular successor. The case of *Muirhead*, when properly understood, raises no difficulty. All it appears to settle as matter of general doctrine is clear, that the right of a widow *jure relictae* lies against the executors of the deceased husband. But not the less for that reason is it a *jus crediti* preferable in competition with legatees or next of kin, or any persons taking from or representing the intestate. I therefore come without any difficulty to the conclusion that the Lord Ordinary is right.

The other judges concurred.

Agent for Reclaimer—D. F. Bridgeford, S.S.C.

Agent for Respondent—D. T. Lees, S.S.C.

Agent for Trustees—M. Macgregor, S.S.C.

Thursday, January 28.

JARDINE v. PENDREIGH.

*Sale—Delivery—Timeous Rejection—Guarantee—Retention in Security.* Held that a purchaser, who intimated on receipt of goods that they were disconform to contract, but that he would not allow the sellers to remove them until they sent him other goods in their place, and did not withdraw that restriction for about a fortnight, had failed timeously to reject the goods, and was liable for the price.

J. & J. Pendreigh, corn merchants in Edinburgh, sued Jardine, corn merchant, Ecclefechan, for the price of goods sold and delivered. Jar-

dine's defence was that one of the items in the account, viz., "50 bags D. N. flour," had not been purchased by him, but that he had purchased 50 bags "Baltic white;" that he had declined to take delivery of the D. N. flour sent him, and that he had intimated his declination to the sellers.

After a proof, the Sheriff-substitute (HOPE) discerned against the defender, holding it proved that the defender brought 50 bags D. N. flour, and obtained delivery of the same; and that though, by a letter some time after delivery, he refused to accept the flour, as not being conform to guarantee, his pursuers were not bound to take it back, no guarantee being in fact proved.

The Sheriff (NAPIER) adhered.

Jardine appealed.

GIFFORD and JOHNSTONE for appellant.

Solicitor-General (YOUNG) and WATSON for respondents.

At advising—

LORD PRESIDENT—In the view I take of this case I am disposed to assume that the contract was made between the defender and the pursuers' travellers in the terms which appear in the defender's memorandum, viz., that the pursuers, through their agent, sold to him 50 bags of Baltic white at 50s., and with this condition, that the pursuers should be at liberty to send D. N. flour, if it should be better than Baltic white. That is the contract as alleged by the defender. Then it appears from the correspondence that the invoice of the goods was received by Jardine on 20th April, on which day he acknowledged receipt. On 23d April he acknowledged receipt of the flour itself, and says in his letter of that date that he has not yet tried it, but it appeared to him—apparently from an examination of its colour—not equal to Baltic white. On the next day he says—"I have tried the French flour sent me, and I find it quite inferior to the Baltic whites, and on that account I will insist on having Baltic whites in its stead. The flour was guaranteed to me, of which I have proof, to be better than Baltic whites, and I hope you will fulfil your obligation without any trouble." At this date, therefore, the defender distinctly rejected the flour as in implement of the contract of sale, and an obligation thereby immediately lay on him to return the goods thus rejected, or if not immediately returning them, in respect of the distance, he was bound to put them into such custody as that they should thereafter lie at the order of the pursuers. That is a well established rule. But he says nothing at all about the matter at that time. Then, three days after, he writes a letter, on 27th April, in which he says—"The flour lies at the rail station, and I will not allow it to be removed until I get Baltic whites, or something as good." That is to say, he rejects the goods, but holds to the bargain, and retains the rejected goods in security of the fulfilment of the bargain by the sellers. That he was not entitled to do. When a party so retains goods which he has rejected, it must be held, according to sound principles of mercantile law, that he takes the goods. The defender continued in the same position down to 9th May, when, for the first time, he expressly, in writing to the pursuers, gave them liberty to remove the goods. Under these circumstances, the defender is not entitled to refuse payment of the contract price. He must be held to have taken the goods, and not to have rejected them in such a way as, assuming them to be disconform to the contract, he was entitled to do.

The question on the evidence, as to the terms of the bargain, and whether the goods were a due fulfilment of the bargain, is more difficult; but on that I give no opinion, the rather because I think, if we had to pronounce judgment on that, the proof is not complete, and I should have wished more evidence as to the nature of the D. N. flour, as compared with Baltic whites. But it is unnecessary to say more on that, for the other ground of judgment is very clear.

LORD DEAS concurred, holding that the ground of judgment stated was sufficient, but being prepared to go farther, and to hold, with the Sheriff-substitute, that the appellant had in fact purchased D. N. flour, but without any proper guarantee entitling him to reject it.

LORD ARDMILLAN and LORD KINLOCH concurred with the Lord President.

Agent for Appellant—T. J. Gordon, W.S.

Agent for Respondents—P. S. Beveridge, S.S.C.

Thursday, January 28.

#### M'BRIDE v. WILLIAMS AND DALZELL.

*Reparation—Slander—Privilege—Malice—Issue—New Trial.* In an action of damages for slander, the pursuer alleged malice on record. The defender pleaded privilege, but his privilege not being apparent on the pursuer's case, an issue, without malice, was sent to the jury. In the course of the pursuer's proof, the defender's privilege was instructed. *Held* that the pursuer was entitled forthwith to lead proof of malice in answer to the defender's plea of privilege, although the issue, being framed on the footing that there was no privilege, did not contain malice.

New trial granted, the verdict being against evidence.

This was an action of damages at the instance of John Adam M'Bride, Ph.D. and Veterinary Surgeon, against William Williams, Veterinary Surgeon, Principal of the Edinburgh Veterinary College, and Allen Dalzell, M.D., Professor of Chemistry and Materia Medica in the College.

In September 1867 the pursuer was appointed by the Highland and Agricultural Society Professor of Cattle Pathology in the Veterinary College. In March 1868 the defenders sent to the pursuer a letter in the following terms:—

"*Edinburgh Veterinary College, March 1868.*—Dear Sir,—We have done all in our power, by careful inquiry impartially conducted, to arrive at the cause of the unseemly occurrences which have taken place in your class, one of them no later than Wednesday last. We have no desire to hurt your feelings, much less to urge against you any wilful omission of duty, but we feel satisfied that you have failed to preserve that order in your class which is necessary for teaching it; and we need scarcely remind you that the occurrences we allude to, though happening only during your lectures, have a very bad effect on the general credit of this college. We are sorry that your position, in terms of the will of the late Professor Dick, makes it impossible for us to recognise you as a Professor of the College, and receive you as a member of its deliberative council; but this ought to have made you all the more anxious to call in our assistance in checking the first outbreaks of insubordination.