

are entitled to one-half of it.

But then, if what I have already said as to the liferent which accrued to Mrs Miller is correct, the gift of the fee to Mrs Clegghorn's children must be subject to that liferent, and it is not "now," as put in the third question, but only on the death of Mrs Miller that Mrs Clegghorn's children will be entitled to half the fee.

LORD M'LAREN — While this question arises on the construction of Mr Anderson's will, our judgment is only asked upon one provision of the will, a legacy to a daughter Mary Anderson, who died unmarried.

Each of the four daughters of the testator received a pecuniary provision, and the sons, I think, got nothing except what they might take by survivorship of their sisters. It is stated in the case that there is no residue except what may fall into it in consequence of the decision which your Lordships are to give. Now, the question arises in consequence of the death of Mary Anderson, who had only a liferent, and it seems to me to be absolutely clear that Mrs Millar, who is the only surviving sister of the four, takes under the will a life interest in succession to her sister Mary. I can see no grounds for restricting her liferent to one-half of Mary's share in order that the issue of the predeceasing sister might have their shares anticipated, because the liferent is in express words to the surviving sisters, and this lady is the sole survivor. But the difficulty in the case, I think, arises with regard to the destination of the fee. Now, if this had been a case of an ordinary share which the testator had given in liferent, or as an income in life to the daughter, and then had gone on to say, "And in case of the death of my daughter without issue the share shall be divided amongst the survivors," I should not have had much difficulty in holding that there was a gift to the issue by implication, because the expression is obviously elliptical, and there is no way of supplying the ellipsis except by reading a gift to issue into the clause. There could be no reason to contemplate the particular case of the death of the liferenter without issue, except that if there are issue they were intended to take, and no further provision would then be necessary. But then this is a case of accretion amongst the liferenters, and the only provision for the fee is that in the event of all the daughters dying without leaving issue, the division is to be amongst the sons. Now, it is plain that there are various contingencies that might arise besides that of the death of all the daughters without issue. There might be some of them dying with issue and some dying without issue, and we have no means of knowing what the testator would have done if he had made a complete appropriation of the fee applicable to all these events. I think it is perfectly impossible, on any sound principle of construction, to supply what is defective in this clause. Fortunately we have a residue clause which answers the same purpose, for it is a well-settled rule that when contingencies as to legacies are not provided for

the subject of the bequest will fall under the residuary clause. I am therefore of opinion that the fee vests in the children of the two ladies subject to the liferent interest of one of them.

LORD KINNEAR—I agree.

LORD ADAM was absent.

The Court pronounced this interlocutor—

"Answer the first question in the case in the affirmative, and answer the second question in the negative: And in answer to the third question, Find that the fourth parties to the case, as coming in room of their mother Mrs Elizabeth Anderson or Clegghorn, are entitled to payment of the sum of £1200 on the death of Mrs Anne Anderson or Miller: And answer the fourth question in the negative," &c.

Counsel for the First Parties — N. J. Kennedy. Agents — Strathern & Blair, W.S.

Counsel for the Second and Third Parties — Macfarlane—Constable. Agents — Carment, Wedderburn, & Watson, W.S.

Counsel for the Fourth Parties—Guthrie, Q.C.—M'Clure. Agent—P. Adair, S.S.C.

Saturday, December 16.

FIRST DIVISION.

DICK AND OTHERS, PETITIONERS.

Trust—Petition for Removal of Trustee—Appointment by Court of New Trustee—Nobile Officium.

The two surviving trustees under a postnuptial contract of marriage and trust-settlement having failed to agree as to the management of the trust-estate, a petition was presented to the Court by one of them, with the concurrence of all the beneficiaries under the trust, for the removal of the other trustee, or alternatively for the appointment of a new trustee named by the petitioners to act upon the trust. The ground upon which the petitioners supported their petition was, that owing to the refusal of the respondent to sign the discharge of a bond the affairs of the trust were at a deadlock.

After the petition had been presented the discharge in question was signed by the respondent. The respondent, in answers lodged by him, objected to the appointment of the trustee named by the petitioners, but in the course of the debate he intimated that he had no objection to him personally, and that he would assent to his being assumed as an additional trustee.

The Court *refused* the prayer for removal, but *appointed* the new trustee named by the petitioners.

A petition was presented by Mr John Dick, trustee acting under the postnuptial contract of marriage and trust-settlement of

Mrs Janet Robertson and her husband, the late Dr George Robertson, and by the said Mrs Robertson and her son Cecil James Robertson, the beneficiaries under the trust, craving the Court "to remove Alexander Mitchell Carnwath Dick from the office of trustee under the said postnuptial contract of marriage and trust-settlement of the said Mrs Janet Train Lawrie or Robertson and George Robertson, or otherwise to appoint David Robertson as a trustee under said contract of marriage, with the powers contained therein, and in the statute, including a power to assume new trustees." Dr Robertson died in 1883 survived by his wife, and Messrs John Dick, Peter Robertson, and William Milne accepted office as trustees, and continued to act as such till the death of the two last-named gentlemen. Thereafter in December 1886 Mr John Dick assumed his son Alexander Mitchell Carnwath Dick as a trustee under the trust.

The present petition was presented by Mr John Dick, with the concurrence of the liferentrix Mrs Robertson and of her son Cecil James Robertson, the only other beneficiary under the trust.

The petitioners averred "that in or about May 1897 the agent in the trust having forwarded to the said Alexander Mitchell Carnwath Dick for his approval a proposal for loan of part of the trust-funds, he, in answer, replied on 15th May 1897—'Robertson's M.C. Trust. I return the proposal for loan of £300. I really do not see what's the good of me bothering with this trust, and do not longer wish to act as trustee. You can date my resignation therefore from the time of the last loan.' Thereupon a formal minute of resignation was forwarded to him for his signature, but he has not signed or returned the said deed. That part of the trust investments consists of a bond for £150 over a property in Argyle Place, Edinburgh, which loan fell to be paid off in terms of notice at Martinmas 1899. A discharge of the said bond was on 31st October 1899 forwarded to the said Alexander Mitchell Carnwath Dick for his signature as trustee foresaid, and although requested to return the deed signed he refused to do so, or even to answer the communications. The want of the said discharge is causing loss and inconvenience not only to the trust but to the borrower. That the administration of the trust has thus been brought to a standstill, and will so remain unless the said Alexander Carnwath Dick is removed or some other person assumed to act along with him and the petitioner, the said John Dick."

Answers were lodged by Alexander Dick, who denied that the administration of the trust had been brought to a standstill, or that he had refused to sign the discharge of the bond referred to by the petitioners. He stated that he had reason to complain of certain conduct of the agent of the trust, and averred that the sole object of the petition was to enable the trust to be brought to a close by paying over the trust funds to the petitioner Mr Cecil James Robertson, which course, he was of opinion, could not

be safely followed till after the death of the liferentrix, and that he objected to the appointment of Mr David Robertson, who was the uncle of Mr Cecil Robertson, on that ground. After the presentation of the petition the discharge of the bond in question was duly signed by the respondent.

The petitioner argued that as the trust had come to a deadlock the respondent should be removed, or failing that course that a new trustee should be appointed to act along with himself and the respondent—*Aikman and Others, Petitioners*, Dec. 2, 1881, 9 R. 213.

The respondent in the course of the discussion intimated his willingness to assent to the assumption of Mr David Robertson as an additional trustee, on the understanding that he would follow the opinion of the Solicitor-General as to the winding up of the trust. He argued that the petition was uncalled for, and should be dismissed.

LORD PRESIDENT—It seems to me that there are scarcely sufficient grounds for removing the respondent from the office of trustee. His letter of 15th May 1897, followed by his declinature to sign the minute of resignation, would *prima facie* go far to warrant his removal, but it appears that he is now willing to continue in the trust, not for the purpose of obstructing, but of co-operating in, its due administration. I think we may accept his disclaimer of adherence to the attitude which he formerly assumed, and refuse the prayer for his removal. But it is plain that the trust administration had come to a dead lock when the petition was presented, and although it is to be hoped that the relations of the present trustees towards each other may now be more cordial than they have hitherto been, there is no security that this will be so. Accordingly, it seems to me that there should be a third trustee. I understand that respondent has no objection to Mr Robertson—indeed, his counsel intimated that he is now willing to assume him. Under these circumstances I think the best course will be to appoint Mr Robertson as a trustee, so that there will be an odd number of trustees, and the risk of a deadlock in future will be avoided.

LORD M'LAREN—I am of the same opinion. I am not satisfied that the respondent had any justifiable ground of complaint against the trust administration, unless on the one point of the deposit-receipt being taken in the name of the agent. There is certainly no proof that the other trustee desired to wind up the trust prematurely. What is disclosed by the correspondence is that in consequence of a claim or wish expressed by the beneficiaries that the capital should be divided, the trustees proposed to take the opinion of counsel. That seemed to be an entirely proper position on the part of the trustees.

LORD ADAM and LORD KINNEAR concurred.

The Court pronounced this interlocutor—

"Refuse the prayer of the petition in so far as it craves the removal of the

respondent the said Alexander Mitchell Carnwath Dick from the office of trustee under the postnuptial contract of marriage and trust-deed of settlement of Doctor and Mrs George Robertson, and of consent appoint David Robertson, Esquire, 4 Maitland Street, Edinburgh, to be a trustee under said contract of marriage and deed of settlement, with the powers contained therein and in the Trust (Scotland) Act 1867, including the power to assume new trustees: Further, authorise the said trustees to complete a title *habili modo* to the trust-estate set forth in the prayer of the petition: Allow the expenses of the petitioners to be taken out of the funds of the trust-estate: And *quoad ultra* find no expenses due to or by any of the parties, and decern."

Counsel for the Petitioner—C. D. Murray.
Agent—Marcus J. Brown, S.S.C.

Counsel for the Respondent—J. D. Millar.
Agents—Duncan & Black, W.S.

Saturday, December 16.

SECOND DIVISION.

WINN v. QUILLAN.

(*Ante*, October 27, 1899, p. 38).

Expenses—Jury Trial—Certificate by Presiding Judge—Court of Session Act 1868 (31 and 32 Vict. cap. 100), sec. 40.

By section 40 of the Court of Session Act 1868 it is enacted—"Where the pursuer in any action of damages in the Court of Session receives by the verdict of a jury less than £5, he shall not be entitled to recover or obtain from the defender any expenses in respect of such verdict, unless the judge before whom such verdict is obtained shall certify on the interlocutor sheet that the action was brought . . . for the vindication of character and was in his opinion fit to be tried in the Court of Session."

Opinion (per Lord Young) (1) that the only effect of granting such a certificate is to put the awarding of expenses within the power of the Court, and that it does not *per se* entitle the pursuer to an award of expenses; and (2) that the motion for a certificate should be made in presence of the defender.

Peter Winn raised an action of damages against James Quillan for having falsely and calumniously on six separate occasions, extending over a period of ten years, called him an informer, thereby representing that the pursuer was a man who for the sake of reward and from sinister and disreputable motives had betrayed his fellows and disclosed secrets or given information to the Crown or its executive against Irishmen and others, to the loss, injury, and damage of the pursuer.

The Court sustained the relevancy of the action (*ante*, p. 38), and six issues were adjusted, one for each occasion, and damages laid at £500.

The case was tried before the Lord Justice-Clerk and a jury. The jury returned a verdict for the pursuer on all the issues and assessed the damages at one farthing. Thereafter, on the application of the pursuer, made without intimation to and not in the presence of the defender, the Lord Justice-Clerk granted the pursuer a certificate to the effect that the action was brought for vindication of character and was fit to be tried in the Court of Session.

The pursuer moved for his expenses, and argued—The presiding judge who had tried the case had granted a certificate, and this showed that in his opinion the pursuer was entitled to expenses. Where a pursuer succeeded in obtaining a verdict and damages for slander, and received a certificate from the judge presiding at the trial, he was entitled to his expenses even though the damages given were nominal—*Craig v. Jex Blake*, July 7, 1871, 9 Macph. 973; *Bonmar v. Roden*, June 1, 1887, 14 R. 761; *Macmillan v. Wilson*, October 25, 1887, 15 R. 6. Where the pursuer had failed on some of his issues there might be modification—*Rogers v. Dick*, February 4, 1864, 2 Macph. 591—but in the present case he had been successful all along the line.

Argued for defender—The statute only provided for what was to happen as regards expenses in the event of the pursuer not getting a certificate from the judge; it did not say what expenses he was to get in the event of his getting a certificate. This question was accordingly left to be determined by the common law. The Court were entitled to modify expenses in actions which ought to have been brought in the Sheriff Court or where juries had awarded small sums of damages—*Jamieson v. Hartil*, February 5, 1898, 25 R. 551; *Shearer v. Malcolm*, February 16, 1899, 1 F. 574. And in *Graham v. Napier*, January 21, 1874, 1 R. 391, the expenses were modified notwithstanding that the certificate had been granted. The present was a typical case for modification. It should have been brought in the Sheriff Court; there had been unnecessary delay, and some of the issues were superfluous.

LORD JUSTICE-CLERK—I do not think that this is a case for modification of expenses on any ground connected with the verdict. I think the case was one in which the pursuer was entitled to raise an action in the Court of Session for vindication of his character, and one in which the pursuer could not have allowed the course of slander to which he was persistently subjected to be continued without grave consequences to himself. I was of that opinion when I granted the certificate, and I still think that nothing came out at the trial to preclude the pursuer from getting that certificate. I am therefore of opinion that the pursuer is entitled to the expenses of the trial without modification.