whether the proceedings were civil or criminal he gave no opinion.

Agent for Pursuer—

Agents for Defenders—Maclachlan & Rodger, W.S., and Maconochie & Hare, W.S.

Friday, December 18.

SECOND DIVISION.

LANG *v.* LANG.

(*Ante, p.* 20.)

Conjugal Rights Act 1861—*Common Law—Custody of Children—Final Decree.* Held that a decree exhausting the merits in an action of separation and aliment was a final decree in the sense of the Conjugal Rights Act, and that after such decree is pronounced it is incompetent, both at common law and under the Act, to make a motion to the Lord Ordinary or the Court providing for the custody of children.

In this case the Court some time ago pronounced decree of separation *a mensa et thoro* in favour of the wife, on the ground of the husband's cruelty. The case then was brought before the Lord Ordinary on the question of aliment, and his Lordship having found the wife entitled to £100, a reclaiming note was boxed against the Lord Ordinary's interlocutor, and the Court modified the award of the aliment. The pursuer of the action (wife) then make a motion before the Lord Ordinary (JERVISWOODE) praying for an order to regulate the custody of two of the pupil children of the family. The Lord Ordinary appointed the children to be under the custody of the mother. The defender reclaimed.

PATTISON and CRICHTON for her.

CLARK and BLACK in answer.

The Court held that the Lord Ordinary had no power, either under the Conjugal Rights Act or at common law, to entertain this motion after final decree had been pronounced in the action, and accordingly recalled the Lord Ordinary's judgment. Lord Benholme was absent, but his dissent, on the ground of the expediency of recognising the power of the Court to deal with such a matter, was intimated by the Lord Justice-Clerk.

In answer to a question by Mr Clark, it was stated by the Lord Justice-Clerk that it was not contemplated that in such an action, or in an action of divorce, there should be conditions applicable to the custody of children.

Agent for Pursuer—W. H. Muir, S.S.C.

Agent for Defender—James Young, S.S.C.

Saturday, December 19.

BUTLER-JOHNSTONE *v.* JOHNSTONE AND OTHERS.

Entail—Interpolation—Clause of Devolution. Held (1) that the fetters of an entail cannot be effectually imposed by a supplementary deed referring to the deed containing the conveyance of the lands, but not itself containing any conveyance of the said lands, although the said two deeds were intended by the grantor to be read together as a *mortis causa* disposition and settlement of the lands in question; (2) (altering Lord Jerviswoode) that the interpolation of the word "not" in the clause prohibiting the alteration of the order of succession was fatal to the validity of the entail; (3) (diss. Lord Justice-Clerk) that the deed of entail being invalid, a clause of devolution was not binding on the heir in possession of the estate.

This was an action brought by the Hon. Mrs Butler Johnstone Munro, heiress of entail in possession of the estates of Corehead and others, in the county of Dumfries, to have it found and declared that she was entitled to hold these estates in fee-simple, and free from the fetters of the entail thereof, and free from the obligation contained in a clause of devolution inserted in the entail.

There were three deeds. The first dated in 1796 contained a conveyance of the estate in favour of a series of heirs, but without any fettering clauses. The second deed, dated in 1799, and which bore to be a supplementary deed of entail, contained no conveyance of the estate, but referred to the previous deed of 1796, ratified all its provisions, and declared that the lands conveyed by it (the first deed) should be held under the fetters of a strict entail as set forth in it (the second deed). The third deed, dated in 1800, was a conveyance of the same estates, by the heirs of entail then in possession, in favour of the series of heirs mentioned in the first deed, and under the fetters of a strict entail. The first and third deeds further contained a clause of devolution, providing that every heir of entail who came to be the heir or apparent heir or representative of Sir Alexander Munro should be bound and obliged to divest himself or herself of the estates, and to convey the same to the person next entitled thereto, according to the destination in the entails. The pursuer pleaded that as the deed of 1796 contained a conveyance of the estate, but no fettering clauses, it could not be regarded in any sense as an entail, and that it could not have that character conferred upon it by the supplementary deed of 1799, which contained the fetters of the entail but no conveyance of the lands. With regard to the deed of 1800, she pleaded that the same contained no effectual prohibitory clauses, inasmuch as the word *not*, occuring in the clause prohibiting the alteration of the order of succession, was interpolated, and therefore, that the whole entail was ineffectual under the provisions of the Rutherfurd Act. She further pleaded that the clause of devolution was inapplicable and not binding upon her—she not possessing the character pointed at, and the clause being, moreover, only part of a destination which was not protected by effectual fettering clauses.

The defender pleaded that the deeds of 1796 and 1799 together constituted a valid entail of the estates, that the deed of 1800 was a valid and effectual entail, and not challengeable on the ground stated; and that, in any event, the clause of devolution was binding upon the pursuer, as, in consequence of the death of her brothers without issue, she had acquired the character of heir and representative of Sir Alexander Munro in the sense of that clause.

The Lord Ordinary (JERVISWOODE) pronounced the following interlocutor:—"The Lord Ordinary having heard counsel and made avizandum, and considered the record and whole process—sustains the 3d and 4th pleas in law stated on the part of the defenders, and also the 5th plea for them, to the effect thereby maintained, that the deed of 1800 is duly executed and authenticated in terms of

law: Repels the pleas for the pursuer, in so far as inconsistent therewith, and assoilzies the defenders from the conclusions of the action, and decerns: Finds the defenders entitled to their expenses, of which allows an account thereof to be lodged, and remits the same to the auditor to tax and to report.

"*Note.*—The Lord Ordinary had the benefit in this case, which is doubtless one of much importance and interest to the parties, of an able and satisfactory argument. But that argument embraced, with perfect propriety, a wider field than that on which the Lord Ordinary thinks it necessary to enter in briefly explaining the grounds of his present judgment.

"He assumes, in the outset, that no serious doubt can be entertained, if the entail of 1800 be effectual and binding on the pursuers in any sence, the terms of the clause declaring that, in the event of any person succeeding to the lands and estates contained in the entail, and thereafter coming to be the heir of Sir Alexander Munro, is sufficient to provide that such person shall be bound and obliged to divest himself or herself of the said lands and estates.

"The really important inquiry, therefore, regards the validity of that entail of 1800; and in dealing with the question, it seems to be right to state that the Lord Ordinary assumes it to be clear, as a general proposition sound in law, that in a question *inter hæredes*, the fact that the entail is not recorded in the Register of Tailzies cannot be pleaded by an heir in possession as affording any warrant for a disregard on his or her part of the provisions and conditions of the deed. Now, taking it to be so, the Lord Ordinary heard nothing in relation to the special provisions of the deed of 1800 which would lead him to hold that they are framed otherwise than in such terms as effectually to bind the pursuer. But it is said, and the 5th plea in law for the pursuer is directed to that matter, that the said deed of 1800 is truly altogether ineffectual and invalid, in respect of the erasure or interpolation of the word 'not' in the prohibitory clause. The deed itself was produced to the Lord Ordinary for inspection, and he examined it accordingly.

"That examination satisfied him that the writer of the deed had, after writing the word 'shall,' as mentioned in the 14th article of the condescendence, written the word 'be,' which immediately follows the 'not,' as it now appears, and perhaps other following words, before he observed the omission of 'not' after the word 'shall,' and he appears to have inserted the said word 'not' in a contracted space between the said words. The Lord Ordinary is not satisfied that this was certainly done after the deed had been completed. But however that may be, the Lord Ordinary has come to the conclusion that the objection founded on the fact of the interpolation is insufficient in law to nullify the clause; as, if the *whole* clause be read, the grammatical construction of the passage —'that it shall' (not) 'be lawful to me, *or* to any of the heirs of tailzie or substitutes above named, *nor* to the descendants of their bodies who shall happen to succeed to the lands and others above specified, to alter, innovate, or change the order of succession above specified,'—seems to be such as to demonstrate that the omission of the word 'not' in question, if ever omitted at all, was a mere clerical blunder, to give effect to which, as sufficient to render the whole clause ineffectual, would carry even the admittedly strict rule applicable to such a deed far beyond what is warranted by any of the previous judgments of a kindred character.

"On the whole, the Lord Ordinary is of opinion that the defenders must here be assoilzied."

The pursuer reclaimed.

SOLICITOR-GENERAL and DUNCAN for him.

MILLER, Q.C., and BLAIR for defender.

The Court held that the deed of 1800 was vitiated by reason of the interpolation of the word "not" in the clause prohibiting alteration of the order of succession, and that the fetters of an entail cannot be effectually imposed by a supplementary deed referring to the deed containing the conveyance of the lands, although the two deeds were intended by the grantor to be read together as a *mortis causa* disposition; and, by a majority (Lord Justice-Clerk dissenting), that, the deed of entail being invalid, a clause of devolution was not binding on the heir in possession of the estate. The Lord Justice-Clerk was of opinion that the clause of devolution was binding on the party who took under the voluntary deed.

Agent for Pursuer—James Steuart, W.S.

Agents for Defenders—Hunter, Blair, & Cowan, W.S.

Saturday, December 19.

OUTER HOUSE.

(Before Lord Barcaple.)

BELL *v.* JARVIS.

Maills and Duties—Landlord and Tenant—Taxes. A creditor in possession under decree of maills and duties is only liable in ordinary diligence. A landlord held liable in a question with his tenant for the owner's proportion of all taxes upon the amount of the sub-rents except poor-rates.

Mrs Jarvis was proprietrix of subjects in Dumbarton. These she let in 1856 to M'Lean and Loban at a rent of £19, 19s., on a lease for ten years. The lease gave power to the tenants to build, and bound them to insure the buildings when erected. At the expiry of the lease the buildings were to belong to Mrs Jarvis without giving any compensation to the tenants. The rent having fallen into arrears, Mrs Jarvis obtained decree of maills and duties against the lessees and their subtenants in the buildings erected by them for the amount of the principal rent due and to become due. Under this decree she entered, previous to her marriage, into possession of the subjects by factors, whom she appointed from time to time to manage the property and draw the sub-rents. The pursuer was the first of these factors, and he bound himself, as a condition of his appointment, to free Mrs Jarvis from all claims by the lessees. His factory was put an end to by Mrs Jarvis after lasting only one year. The pursuer, in May 1865, obtained an assignation from M'Lean and Loban of their rights as lessees, and in December 1865 he raised this action of count and reckoning against Mrs Jarvis for her intromissions under the decree of maills and duties. Accounts having been lodged, the same were remitted to Mr Martin, accountant. He made a lengthy report, and submitted therein questions for the decision of the Court.

DUNCAN for pursuer.

R. V. CAMPBELL for defenders.

The following authorities were cited:—Poor Law