

very strongly, that if the rents fell short, the deficiency should be charged on the capital of the heritable estate.

"The Lord Ordinary does not think that the defenders' view as to the incidence of this burden is well founded. He thinks the question is one depending upon the intention of the truster, for the maintenance of Mrs Wighton senior is one of the unexhausted purposes of the trust. The direction of the trust-deed is that his widow's maintenance be paid out and from 'the yearly income of my trust estate'—that is, from the income of his whole trust-estate, both heritable and moveable. It is a bequest from annual proceeds, and not an heritable debt of the truster. The supervening intestacy which has occurred makes it necessary now to distinguish the estate into heritable and moveable, and equity requires, in order to do justice as between heir and executor, that the catholic burdens be rateably divided between the two.

"The same result is reached by viewing the provision made to Mrs Wighton senior as coming in place of her legal rights of *terce* and *jus relicte*. Her *terce* would have been a burden on the heritage, her *jus relicte* on the moveables. The surrogate provision must in equity be laid rateably both on the heritable and on the moveable estate.

"The trustees of Mr Wighton senior very properly took no part in the discussion. Their only object is to obtain exoneration by paying or denuding under the order of Court, and although the present action is not in form a multiplepounding, it falls to be disposed of on similar principles.

"In strictness, the trust cannot be wound up during the life of Mrs Wighton senior, but perhaps parties might arrange to reserve a fund sufficient for her maintenance, so as to permit of the trustees being relieved of the rest of the estate. Probably, however, this is rather a matter for extrajudicial arrangement."

The defenders reclaimed, and it was further urged by them that the trustees of the said William Wighton senior having been infest *qua* trustees in his heritable estate took such infestment for behoof of and as representing William Wighton junior, the party beneficially interested in said estate, and that accordingly his widow is entitled to claim *terce* from said estate in which her husband was constructively vested. (*Rose v. Fraser*. Ross' L.C.)

This question not having been raised on record or before the Lord Ordinary, the Court adjourned the case to hear parties upon it. When the case was called, the Solicitor-General, for the defenders, stated that on inquiry he had found that no infestment had been taken by the trustees until after the death of William Wighton junior, who only survived his father seven months, and that accordingly it was unnecessary to discuss the question.

The Court pronounced the following interlocutor:—

"The Lords having heard counsel on the reclaiming-note for Mrs Elizabeth C. Barns or Wighton, and William Grant, her trustee, against Lord Gifford's interlocutor of 4th November 1873, refuse said note, and adhere to the interlocutor complained of: Find the reclaimers liable in expenses from the date of the Lord Ordinary's interlocutor, and remit to the Auditor to tax the same and to report: and remit to the Lord Ordinary to proceed

with the cause, with power to decern for the expenses now found due; and decern."

Counsel for Pursuers (Respondents)—Solicitor-General (Clark), Q.C., and Jameson. Agents—W. & J. Cook, W.S.

Counsel for Trustees—J. H. A. Macdonald. Agents—Lindsay, Paterson & Hall, W.S.

Counsel for Defenders (Reclaimers)—Guthrie. Agent—W. S. Stuart, S.S.C.

Saturday, January 10.

## FIRST DIVISION.

[Sheriff of Midlothian and Haddington.

BEGG AND OTHERS (TRUSTEES FOR DEACONS' COURT OF NEWINGTON FREE CHURCH) v. JACK.

*Process—Interdict and Removing—Summary Application—Mutual Wall.*

The respondent in this case erected a gable wall partly on the site of a mutual wall between his property and that of the complainers. The latter, though repeatedly, in the course of a correspondence, objecting to his interfering with the height of said mutual wall, took no legal steps to prevent the gable being proceeded with, but allowed the respondent to continue his operations until said gable had reached the height of four storeys. The complainers having then presented a petition to have the wall removed, *Held* that, in these circumstances, the present case was not one suited for a summary application—the Court being of opinion that it was quite unreasonable to delay until a building had been all but completed, and then apply summarily to have it pulled down.

Counsel for Complainers — Solicitor - General (Clark) and Jameson. Agent—John Auld, W.S.

Counsel for Respondent—Lord Advocate (Young) and Campbell Smith. Agent—J. B. W. Lee, S.S.C.

Tuesday, January 13.

## SECOND DIVISION.

[Lord Ormisdale, Ordinary.

GREIG v. BARCLAY AND OTHERS.

*Contract—Reduction—Error—Facility and Fraud.*

Circumstances in which *held* that there were no relevant grounds of action.

This was an action at the instance of Peter Greig, residing in Crail, only surviving son and heir-at-law of the deceased Andrew Greig, ship-owner and hotel-keeper, Newhaven, against Clementina Barclay, wife of Richard Cockerton, 82 Cornwall Gardens, South Kensington, London, and Richard Cockerton for his interest, Margaret A. P. Barclay, wife of Thomas Watson, writer, 56 W. Regent Street, Glasgow, and Thomas Watson for his interest, Mary Stewart Barclay, wife of D. L. Foggo, broker, Glasgow, and D. L. Foggo for his interest, as heirs *in mobilibus* of the late Thomas Barclay, auctioneer, Glasgow,