*Tuesday, June 4.*

## FIRST DIVISION

### DUKE OF ATHOLE *v.* ROBERTSON.

*Proof—Act 17 and 18 Vict. c. 34, sec. 1—Citation of a Witness Resident Beyond the Jurisdiction of the Court.*

Where a party whom it is desired to cite as a witness in terms of the 1st section of the Act 17 and 18 Vict., cap. 34, is a party to the cause, and has his ordinary residence in Scotland, the slightest suggestion that the proposed witness has anything to say at all material to the case will justify the Court, in the exercise of its discretion, in ordering the issue of a warrant of citation.

Circumstances and averments in consequence of which the Court (*dub.* Lord Shand) ordered a warrant of citation of a witness to be issued under the 1st section of the Act 17 and 18 Vict., c. 34.

A question regarding the citation of a witness residing outside the jurisdiction of the Court, under the Act 17 and 18 Vict., c. 34, sec. 1, arose in this case, which was a petition and complaint at the instance of the Duke of Athole against Alexander Robertson for breach of interdict. The respondent had denied the right of the complainer to levy pontage dues from those making use of the bridge over the Tay at Dunkeld, and had further himself on several occasions in February 1868 forced a passage across the bridge without paying toll. The complainer in consequence obtained an interdict against the respondent, who nevertheless persisted in crossing without payment. This petition and complaint was therefore presented. The respondent failing to appear, the Court, on 9th January 1872, granted warrant to arrest and imprison him, but as he had fled the country this order could not at the time be enforced. In the present year he returned to Scotland, and recommenced his practice of using the bridge without payment. The complainer called upon him to appear before the Court, but without effect, and in consequence was obliged to cause him to be apprehended under the warrant of 1872.

The respondent now lodged answers. He averred *inter alia*—"(4) The whole statements of the complainer are denied. The respondent was on 16th May current informed that he could pass the toll as often as he so pleased, and he has since availed himself of the said permission without payment being demanded. The complainer has himself condoned any offence which may have been committed."

The Court having allowed both parties a proof, the respondent presented a note to the Lord President praying his Lordship to move the Court under the Act 17 and 18 Vict. cap. 34, sec. 1, to order a warrant of citation commanding the complainer to attend the proof. The complainer was at the time living in London, and the note set forth that he was "an important witness for the respondent."

Argued for the respondent—The complainer was a necessary witness on the question of condonation; also as to whether he had really authorised the proceedings, and as to the true proprietorship of the bridge.

Argued for the complainer—The matter was by the Act entirely within the discretion of the Court, who would not order a witness to attend unless they were satisfied that there was a high probability of knowledge on his part, and that it was impossible to get the same evidence from others within the jurisdiction of the Court. But the complainer knew nothing personally about the matter, and the respondent had averred nothing which the complainer only could prove. As to condonation, that was not averred by the respondent; at least he had not stated by what specific acts the complainer had condoned his offence.

Authority—*Allen* v. *Duke of Hamilton*, 1867, 2 L.R. (C.P.) 630.

At advising—

Lord President—It has been very properly said that in acting under section 1 of the Act 18 and 19 Vict. we are exercising a discretion, and it would be very strange if our duty was not of that nature, because the statute empowers us to summon persons who are not within our jurisdiction, and who may never have been within our jurisdiction, and who, if they were not entitled to object, might be dragged here for the purpose of annoyance when they had nothing at all to say. But it is very different where we are dealing with a person who has before resided in Scotland, who has an estate and all his great interests in Scotland, and who is also a party to the suit in which it is proposed to call him. I confess that in a case of that kind the slightest suggestion of the proposed witness having anything to say at all material to the case would be a sufficient ground for granting the warrant. In the present case the respondent has averred that the Duke of Athole has condoned the offence which he now seeks to have punished. In these circumstances I think that in the exercise of the discretion given to us by the statute it is our duty to grant this warrant.

Lord Deas and Lord Mure concurred.

Lord Shand—I am not disposed to differ, but I confess I have more difficulty than your Lordships in granting this application. If the witness had been resident in this country the respondent would have been entitled to cite him. But when a witness is resident in England the Legislature has given us jurisdiction to cite him, but has also given a certain discretion to the Court. In such circumstances it is not enough that the party should say that he is a material witness. He must show the necessity of citing him. It does not seem to me that the witness being a party to the suit makes any difference, nor that his ordinary residence is in Scotland. The fact that he is resident in England entitles him to the protection of the Court. If the points to be proved were those which the respondent has mainly brought forward—whether the Duke authorised the proceedings, or whether he was proprietor of the bridge, or whether the accounts were properly kept—I am quite clear that I should have been for refusing the application. Even on the question of condonation I have some difficulty. I think it was the duty of the respondent to state what particular acts constituted condonation. But as there has been a general allegation of condonation, and as your Lordships are of opinion that that is enough, I am not disposed to differ.

Counsel for Complainer — Balfour — Low. Agents—Tods, Murray, & Jamieson, W.S.

Counsel and Agent for Respondent—Party.

*Wednesday, June 5.*

## SECOND DIVISION.

### SPECIAL CASE—DUTHIE'S TRUSTEES AND OTHERS.

*Succession—Legacy — Continuing Trust — Fee and Liferent.*

A testator by will directed that all legacies "shall vest in the legatees at the time of my death, and I further direct that the legacies to females who are married at the time of my death shall be invested by the said trustees for their behoof exclusive of the *jus mariti* of their then or any other husbands they may afterwards marry, and the annual proceeds thereof paid to such legatees during their respective lives, and thereafter divided among their children." *Held* that upon a construction of the testator's intention the trustees must hold these funds for the married ladies in liferent and their issue in fee.

*Observations* on the cases of *Gibson's Trustees* v *Ross*, July 12, 1877, 4 R. 1038; and *Massy* v. *Scott's Trustees*, Dec. 5, 1872, 11 Macph, 173.

*Succession—Alimentary Annuity—Bequest of Residue —Implied Revocation in a Subsequent Codicil.*

A testator by his trust-disposition and settlement provided for his sister an alimentary annuity of £600, to be secured over his heritable estate, and he also made a bequest of the residue, subject to his sister's liferent, to certain relatives. Subsequently he executed a codicil making his sister sole residuary legatee. *Held* (*dub.* Lord Justice-Clerk) that the bequest of the residue in the codicil did not by implication revoke the direction as to an alimentary annuity, and that the trustees were bound, before paying over the residue to secure that annuity over the heritable estate as directed.

Mr Duthie died on 24th June 1877 leaving a trust-disposition and settlement. He was never married, and his sister Miss Duthie, the party of the fourth part, was his next-of-kin. His personal estate amounted to about £71,500, and his heritable estate was valued at about £54,910. Certain questions arose upon the meaning of the trust-disposition, which resulted in this Special Case, to which the parties were (1) the testator's trustees; (2) female legatees married at the date of the testator's death; (3) children of the parties of the second part; and (4) Miss Duthie, sister of the testator.

The first question arose upon the third purpose of the deed, which was as follows:—"In the third place, I leave and bequeath and direct the said trustees to make payment at the first term of Whitsunday or Martinmas happening six months after my death—(*here followed the names of the legatees, amongst whom were several ladies who were married at the date of the testator's death*) — which annuity — (*this was an annuity bequeathed to the testator's sister, and afterwards referred to*)—and legacies hereby bequeathed are to be paid free of legacy or other duty, and shall vest in the legatees at the time of my death; and I further direct that the legacies to females who are married at the time of my death shall be invested by the said trustees for their behoof, exclusive of the *jus mariti* of their then or any other husbands they may afterwards marry, and the annual proceeds thereof paid to such legatees during their respective lives, and thereafter divided amongst their children."

Upon this purpose the following questions of law were stated—"(1) Are the parties of the first part bound or entitled to make payment in cash to the parties of the second part of the sums of money bequeathed in favour of them respectively under the third purpose of the said trust-disposition and settlement? (2) Are the parties of the first part bound or entitled to hold the capital of each of the sums bequeathed in favour of the parties of the second part until the death of the female married legatee interested, paying to her the annual proceeds, and upon her death to divide the said capital sum amongst her children? or (3) Are the parties of the first part bound or entitled to invest the capital sums bequeathed in favour of the second parties and their children, the titles being taken in the terms of the clause of the said third purpose of the trust-disposition and settlement?"

They argued that the legacies to married females imported an absolute right of fee becoming vested in them (exclusive of the *jus mariti* of their husbands) as at the death of the testator, and that they were consequently entitled to have the capital sums of those legacies at once paid over to them in cash. On the other hand, it was maintained on behalf of the children of the married females, and others who were not married at the time of the testator's death, all parties of the third part, that the right of each of those ladies was merely to the annual proceeds during her life, and that the trustees (the parties of the first part) were bound to hold the capital of each of those legacies until the death of the female married legatee, and at that time it fell to be divided among the children. This was also the contention of the trustees, but they further argued that if they were not so bound to hold the capital sums of the legacies they ought to protect the interest of the children by placing the moneys in investments in the name of the ladies in terms of the trust provisions applicable thereto.

The authorities quoted are stated below at the conclusion of the argument upon the second question. The Court delivered their opinions on each point separately, but for convenience they are reported together.

In the second purpose of his settlement Mr Duthie left an annuity of £600 per annum to his sister. It was declared to be purely alimentary, and exclusive of the *jus mariti* of any husband she might marry. There was this further direction—"And I direct the said trustees to provide full and ample security to my said sister for payment of said annuity on my heritable estate, or otherways as they may think proper, other than by purchasing an annuity, which they are hereby expressly prohibited from doing, and the security to be granted for said annuity shall be taken in the names of the said trustees in trust for the payment thereof; further, it is my will and I direct that my said sister shall have the liferent use of the house, garden, offices and pertinents at Broadford Place, Aberdeen &c., . . . free of rent," &c. In a subsequent part of the deed disposing of the residue there was this provision—"And with regard to the residue and remainder of my