Thursday, December 10.

OUTER HOUSE.

[Lord M'Laren.

SUTHERLAND, DOWSON, & CO. *v.* THOMSON.

Process—Expenses—Debts Recovery (Scotland) Act 1867 (30 *and* 31 *Vict. cap.* 96).

Circumstances in which the defender in an action raised in the Court of Session was *found liable* in no further expenses than would have been recoverable in the Debts Recovery Court.

This action was raised in the Court of Session at the instance of the proprietors of the newspaper *Iron* for payment of a sum of £31, 12s. claimed by them in respect of advertisements inserted in their paper at the defender's order, with interest from the date of the last insertion. The defender admitted the pursuers' statements, under the explanation, firstly, that the pursuers were entitled to interest on the sum sued for only from the date of citation; and secondly, that prior to the calling of the summons, the sum sued for, and interest from the date of citation, had been tendered by his agent, together with the expenses to which the pursuers would have been entitled had they sued for recovery of said debt and interest in the Debts Recovery Court of Renfrewshire at Paisley. He stated that the delay in payment was due to the fault of a servant, into which he had to make inquiry.

The Lord Ordinary (M'Laren) pronounced this interlocutor:—"In respect it appears that the case was proper to be tried under the forms of the Debts Recovery Act, Decerns in favour of the pursuers in terms of the conclusions for payment; but finds the defender only liable in expenses according to the Table of Fees in the Debts Recovery Act; of consent modifies said expenses to the sum of 14s. 7d., for which sum also decerns in favour of the pursuers.

Counsel for Pursuers—Orr. Agent—R. Pasley Stevenson, S.S.C.

Counsel for Defender—A. S. D. Thomson. Agent—W. R. Patrick, Solicitor.

Friday, December 11.

SECOND DIVISION.

[Lord Lee, Ordinary.

PHILIP *v.* PHILIP.

Succession—Destination to Heirs and Assignees—General Settlement—Acquirenda.

The maker of a general settlement purchased heritage after its date, taking the title to himself and his heirs and assignees whomsoever. *Held* on his death that this heritage did not fall to his heir-at-law, but was carried by the settlement to the disponee thereunder.

On 22nd September 1877 John Philip, a fish-curer in Buckhaven, executed, along with his second wife, the defender of this action, a mutual disposition and settlement which bore to be granted by the spouses "from our affection for each other." By this deed Mr Philip assigned and disponed to and in favour of his wife "and her assignees, whom failing my whole children, equally among them, share and share alike, all and sundry my heritable and moveable estate, of whatever nature or denomination the same may be, which shall belong and be addebted to me at the time of my decease, with the whole writs and evidents," &c. On the other hand, the wife in like manner conveyed to her husband, and his heirs and assignees whomsoever, the whole estate which might belong to her at her death.

In 1884 Philip purchased a small heritable subject in the village of Buckhaven, taking the title in favour of himself "and his heirs and assignees whomsoever."

He died on 8th August 1884, survived by his wife and by his children by a former marriage. There were no children of the second marriage. Thomas Philip, his eldest son, sought declarator that under the destination in the conveyance of 1884, in favour of his father and his heirs and assignees whomsoever, he, pursuer, as eldest son and nearest lawful heir of his father, was absolute proprietor of the subjects in Buckhaven thereby conveyed. He also sought decree of removing against the defender, who had possessed the subjects since her husband's death.

He pleaded—"(1) The succession to the heritable subjects described in the summons being regulated by the destination in the disposition of 1884, as condescended on, the pursuer, as heir under that destination, is entitled to decree in terms of the conclusions of the summons, with expenses."

The defender pleaded—"(1) The said John Philip having validly and irrevocably conveyed to the defender the whole estate belonging to him at the time of his death, including the subjects described in the summons, the defender is entitled to absolvitor, with expenses. (2) Upon a sound construction of the said mutual settlement, and of the disposition of 1884, the succession to the subjects contained in the said disposition falls to be regulated by the terms of the said mutual settlement."

The Lord Ordinary (Lee) pronounced this interlocutor—"Finds that, on a sound construction of the mutual settlement and the disposition of 1884, the succession to the subjects referred to in the summons falls to be regulated by the said mutual settlement: Therefore assoilzies the defender from the conclusions of the summons; and decerns.

"*Opinion.*—This is a competition for a small heritable subject in the village of Buckhaven, which was purchased in May 1884 by the deceased John Philip. He took the title in favour of himself 'and his heirs and assignees whomsoever,' and died on 8th August 1884. The pursuer, as his eldest son by his first marriage, claims to succeed to the property as his heir-at-law, and therefore entitled under the above destination to succeed.

"But the late John Philip in September 1877 executed along with the defender, his second wife, a mutual disposition and settlement. By that deed, which bears to be granted by the spouses 'from our affection for each other,' Mr Philip assigned and disponed, to and in favour of the defender 'and her assignees, whom failing my whole children

equally among them, share and share alike, all and sundry my heritable and moveable estate of whatever nature or denomination the same may be, which shall belong and be addebted to me at the time of my decease, with the whole writs and evidents.' On the other hand the defender in like manner conveyed to her husband, and his heirs and assignees whomsoever, the whole estate which might belong to her at her death. But it does not appear that at the time she had any separate estate. The defender claims the property as belonging to her under the mutual settlement.

"I think it settled that where a man has executed a general settlement, the general disponee, not the heir-at-law, has right to after acquisitions of the disponer, though the rights to them have been taken in favour of 'heirs and assignees.' The decision in *Robson* v. *Robson* in 1794 (M. 14,958) has been followed in subsequent cases (*Patons* v. *Hamilton*, 1797, M. 11,376, and *Ogilvie's Trustees*, in 8 D. 1244), and appears to me to be in point. The doctrine of Erskine (iii. 8, 47) is to the same effect.

"The pursuer cited the cases of *Webster's Trustees* (4 R. 101) and *Farquharson* v. *Farquharson* (July 19, 1883, 10 R. 1253). But in my opinion neither of them is applicable to the present case. In *Webster's Trustees* the title taken to the subjects after acquired contained a special destination to the testator's sister, failing himself and his assignees and disponees; and the disposition bore that the destination was so taken 'at the special request of the said James Webster as evinced by his subscription to these presents.'

"In the case of *Farquharson* the judgment of the Court was that the prior settlement did not convey lands. And although opinions were given by the Lord Justice-Clerk and Lord Young, which went beyond the judgment, I think that they were expressed in such guarded terms as not to support the doctrine contended for by the pursuer, that if the maker of a general settlement dealing with his whole estate shall subsequently acquire a special subject, taking the title to himself and heirs and assignees whomsoever, he must be held to have made a special destination of that subject. With regard to one class of the after acquired subjects, the testator in that case had made a special destination to himself and his wife 'in conjunct fee and liferent for her liferent use allenarly, and to his 'heirs and assignees whomsoever,' which the Lord Justice-Clerk held to be clearly inconsistent with the mutual disposition. With regard to the Leith Street subjects there was more difficulty. But I think it must be assumed that in that case there was good ground in the deeds for the opinion of the Lord Justice-Clerk, that the expression 'heirs and assignees' as there used meant future assignees or disponees of the special subject. Lord Young appears to have had difficulty as to these subjects. He did not commit himself to a decided opinion on the point. Lord Rutherfurd Clark takes care to explain that his opinion was based entirely on the ground stated by the Lord Ordinary, viz., that the settlement did not deal with land.

"I am therefore unable to regard these cases as supporting the pursuer's claim.

"I think the mutual settlement is as effectual in favour of the testator's wife as it would have been in favour of any other person. Any legitim due to his children will of course be claimable by them.

The pursuer reclaimed, and argued—A destination of what a man may have at his death did not comprehend *acquirenda* the title to which was in such terms as here. The effect of the destination of 1884 was to carry the Buckhaven heritage to the pursuer. Had that not been the intention the title would have been taken to the defender after the deceased. The case of *Farquharson* (Lord Justice-Clerk) was conclusive.—*Mearns*, February 20, 1759, 6 Pat. App. 724; *Farquharson* v. *Farquharson, &c.*, July 19, 1883, 10 R. 1253.

Counsel for the respondent was not called upon.

At advising—

Lord Justice-Clerk—I do not think it necessary to refer to my remarks in the case of *Farquharson* v. *Farquharson*, which I think were well founded with reference to the facts of that case. Here the case contended for goes beyond them. The question is, whether the destination to this property purchased subsequently evacuates as to it the conveyance in the mutual deed of settlement. The pursuer's argument really comes (as was said by Lord Young in the course of the debate) to this, that as a man not making a special destination can only take the title to his subsequently acquired property to himself and his heirs and assignees as was done here, therefore where a man has made a general settlement *acquirenda* cannot fall within it, and are not to be included in the ultimate distribution of his estate under the settlement. I cannot assent to that. I am of opinion, then, that the interlocutor is right.

Lords Young, Craighill, and Rutherfurd Clark concurred.

The Court adhered.

Counsel for Pursuer—M'Lennan. Agent—James Skinner, S.S.C.

Counsel for Defender—Gloag—W. Campbell. Agents—J. & J. Galletly, S.S.C.

Friday, December 11.

SECOND DIVISION.

RUSSELL *v.* CLELAND AND ANOTHER.

Proof—Presumption—Implied Discharge and Accounting.

A farmer who was advanced in years and in ill-health got D, his brother, to come and live with him, which he did, carrying on the farm and receiving all payments for stock and crop which he sold. As the brothers met daily no formal account of intromissions was ever rendered by D, and no books were kept. After his brother's death, D was sued by his trustees for an accounting, and averred that he had reported all his transactions from day to day, and that his brother was satisfied therewith. *Held* that the presumption was that D had, as stated, accounted from day to day during his brother's life, and that this