

Session, whereby the pursuers would be prevented obtaining decree in absence till the meeting of the Court in November. That in the action raised by the petitioners any delay would materially affect their interests and chance of recovering the sums claimed; and the present application had been rendered necessary in the circumstance above set forth.

The petition prayed the Court to grant special leave and authority to the clerk or keeper of the Outer-House Roll of Defended and Undefended Causes, in the event of no appearance being made in said action for both or either of said defenders, to enrol said cause in the Roll of Undefended Causes for Saturday first; or to do otherwise, &c.

The LORD PRESIDENT asked if there was any precedent for this motion.

MACLEAN, for petitioners, admitted there was not. The Court refused the petition.

Agent for Petitioners—John Leishman, W.S.

Friday, July 19.

SECOND DIVISION.

JAMES DREW, PETITIONER.

Trust—Trustees—Non-acceptance—Judicial Factor—Discretionary Power—Beneficiaries. Circumstances in which the Court refused to pronounce upon a petition presented by a judicial factor asking instructions in regard to a discretionary power reposed in trustees, upon whose failure he had obtained his appointment.

Mr Drew was in 1861 appointed judicial-factor on the estate of the late Robert Lawrie, Esquire, residing at Whitburn, upon the failure of the trustees under his settlement to accept office. The deceased left a trust-disposition and relative letter of instructions, both dated 20th December 1851, and he added thereto three codicils, dated respectively 2d December 1852, 28th October 1854, and 23d May 1857. The residue of the estate was appointed to be divided upon the lapse of fifteen years from the date of the letter of instruction, that is, upon 20th December 1866. The factor, in 1863, presented a petition for instructions relative to the disposal of the revenue of the estate and of a sum of £2000, referred to in the codicil to be afterwards noticed. Lord Barcaple, then Junior Lord Ordinary, gave the required instructions, in terms of an agreement into which the whole parties interested had entered, relative to the revenue, and *quoad ultra* superseded consideration of the petition. The factor now applied by Note lodged with Lord Mure, Junior Ordinary, for directions relative to the disposal of the £2000 under the following clause in the codicil of 23d May 1857:—"The said trustees, as soon after my death as they shall see convenient, and after provision has been made for the different legatees and legacies before mentioned, *unless they see cause to the contrary*, may invest in government stock or otherwise the sum of £2000 sterling, the interests or profits of which shall be drawn by my daughters or their husbands; but the stock shall be held in the name of the trustees for the benefit of my daughters and their children, should their mother predecease them, or to the survivor of my said daughters failing issue." The factor stated that he did not consider himself to have the discretionary power conferred upon the trustees not to make this investment; but that if he had any dis-

cretion in the matter, he considered the investment inexpedient. He prayed the Court to find that the direction given to the trustees in the codicil was permissive merely, to be carried into effect only if the trustees saw fit, and that by their non-acceptance of office this permissive power had lapsed, and the investment was not to be made. Or otherwise he requested such instructions as to the terms of the investment as the Court might see fit. He stated that his reason for now moving in the petition was, that he had executed the trust except as regarded the said investment, and that he wished to wind up the estate and obtain his discharge. Intimation of this Note was ordered to the trustee's daughters, who were also the residuary legatees. One of them was married five years ago, but there were no children of the marriage. These ladies, along with the husband of the married daughter, returned a Note to the effect that they concurred with the factor in thinking no investment should be made. The petition was reported to the Second Division by Lord Mure, who referred to the case of *Hepburn*, 19th July 1866, 4 M., 1039.

R. V. CAMPBELL for the factor.

Their Lordships unanimously refused to pronounce upon the petition, intimating that the proper course to have the question determined was for the beneficiaries to apply to the Court for a warrant upon the factor to pay over to them the £2000.

Agents—Messrs Maitland & Lyon, W.S.

Friday, July 19.

PAUL v. HENDERSON.

Suspension—Unextracted Decree—Conditional Offer of Payment—Assignment—Refusal—Consignation. A party made a conditional offer of payment of the sum contained in an unextracted decree. The condition was refused, and he then consigned the whole amount and brought a suspension. Held that consignation is equivalent to payment, and that suspension was a competent remedy.

Henderson held an unextracted decree of the Inner-House against Paul and another, as debtors conjunctly and severally liable. Paul offered payment of the sums in the decree, on condition of Henderson granting an assignment thereof to a third party, and under protest of Paul's right to appeal. Henderson refused the assignment as asked, intimating, however, that before extracting the decree he would give due notice. He further intimated that he would apply for payment of a sum consigned in the process in which the decree had been obtained, and in respect of the consignation of which arrestments on the dependence had been recalled. Paul, upon this, consigned the sum in the decret, and raised a suspension thereof, and in respect of this consignation in the suspension, asked to get up the money consigned in the process in which the decree had been obtained.

The Lord Ordinary on the Bills (MURE) refused the note of suspension, as premature and unnecessary, in respect there was neither charge nor threatened charge, the decree not being extracted.

The Lord Ordinary (ORMIDALE) in the action in which the decree had been obtained refused Paul's motion to get up the consigned money.

Paul reclaimed against both interlocutors.

PATTISON and MACDONALD for him.

CLARK and PATTISON in answer.

To-day the Court adhered to Lord Ormidale's interlocutor, but recalled Lord Mure's; and upon Paul's finding caution, passed the note to try the question. The majority of the Judges were of opinion that suspension was a competent remedy, assuming unconditional payment of the sum in the decree had been tendered and consigned on refusal. The question whether the tender under conditions here made was equivalent to an offer of a payment raised a nice and important question, on which they expressed no opinion, that being a question on the merits, to be determined on the passed note.

The LORD JUSTICE-CLERK said—We have first to decide whether the suspension is competent. Mr Thomson Paul's position is this: he is decerned against in a decree in which he is conjoined with another party. He has tendered payment of and consigned the whole amount in the decree; and he says that tender has been wrongly refused. I do not think the remedy of suspension is incompetent (Stair, 1, 18, 4). Consignation is equivalent to payment, and had payment been actually made, suspension would have been competent if the debt was not at once surrendered. There is no rule that the decret must be extracted. Take, for instance, the cases in which titles to land are tried in this way. Mr Paul was not premature, if he has done what is equivalent to payment. It was not unnecessary either. I express no opinion at present on the merits of the important question Whether Mr Henderson was bound to accept the offer and grant an assignation? But the note ought to be passed on caution.

Agent for Suspender—Party.

Agents for Respondent—J. & A. Peddie, W.S.

Friday, July 19.

BARSTOW (MALTMAN'S FACTOR) v. COOK.

Commission—Foreign Witnesses—Penuria Testium—Closed Record. Motion, in a case where the record was not closed, for a commission to examine witnesses abroad, refused, an order for proof after closing of the record being held to serve the same purpose.

This was a motion by one of the claimants in this multiplepounding for a commission to Nova Scotia, to take the evidence of three witnesses who reside there, the depositions to lie *in retentis*, and it came before the Court on report of Lord Barcaple, the Ordinary in the case. The motion is made in a process of multiplepounding and examination brought by Mr Barstow, judicial factor on the estate of the late William Maltman, purser in the East India Company's service. Maltman died at Elie, Fifehire, 3d March 1854, intestate and unmarried, leaving considerable property. Gavin Maltman, in Nova Scotia, a younger brother, was sole heir-at-law and next of kin, and was last heard of about 1849.

After very extensive searches and advertisements in the British American Colonies, it is believed and averred by some of the claimants that he was shipwrecked on the coast of New Brunswick, on the 30th October 1855.

The object of the commission was to examine those parties, with the view of founding on their evidence, as the only vestige to be obtained.

TRAYNER, for the claimants, maintained that he

was entitled to this commission, even although the record had not been closed on the ground of *penuria testium*, and he offered to pay all expenses, including a reasonable sum for the employment of an agent in Nova Scotia to take charge of the interests of his opponents.

The Court unanimously refused to grant the commission, on the ground that the claimant, when the record was closed, might get an order for proof, which would serve his purpose equally well as a commission now.

Agent for Pursuer—William Sime, S.S.C.

Agent for Claimant—Thomas M'Laren, S.S.C.

HOUSE OF LORDS.

Friday, June 7.

LORD ADVOCATE v. SINCLAIR.

(In Court of Session, 3 Macph., 981.)

Salmon—Fishing—Crown Charter—Prescription. Circumstances in which held, on construction of titles and proof of possession, that a proprietor of lands on the sea-shore was vested in the salmon-fishings *ex adverso* of his lands.

This was an appeal against a judgment of the First Division of the Court of Session. In 1846 the Lord Advocate and the Commissioners of Her Majesty's Woods and Forests brought an action against James Sinclair, Esq. of Forss, proprietor of the lands of Holburnhead and others, lying on the sea-shore in the parish of Thurso and county of Caithness, concluding for decree (1) that the salmon-fishings in the bay of Scrabster belong exclusively to the hereditary revenues of the Crown in Scotland, so far as the said salmon-fishings have not been expressly granted to subjects or vassals by charters or otherwise; (2) that the defender "has no right or title to fish for salmon *ex adverso* of the lands of Holburnhead, or in any part of the bay of Scrabster, or the sea coast adjoining, by means of stake-nets or bag-nets, or by net and coble, or in any other manner of way; or at least, in case it should be found that the defender and his predecessors have acquired a right to salmon-fishings *ex adverso* of their lands by exercising the same for forty years under a proper title, for declarator that the defender is only entitled to exercise the said right of salmon-fishing in the manner and to the extent possessed by him and his predecessors during the said period of forty years, and that he has no right or title to extend his fishings into the bay beyond the boundaries within which he and his predecessors formerly fished." The action made no progress until 1860, when the record was closed on revised condescendence and answers. The defender then pleaded (1) the pursuers are not entitled to insist in this action, as they are not vested with a right to salmon-fishings in the bay of Scrabster, and in particular to those *ex adverso* of the defender's lands, either *jure coronæ*, or by a singular title clothed with possession; (2) the Crown having divested itself of the right of salmon-fishing *ex adverso* of the defender's lands by grants to vassals, the pursuers cannot now insist, *jure coronæ*, to prohibit said fishings by the defender; (3) the defender having right by his titles to the lands of Holburnhead and others, which were a portion of the barony of Scrabster, with fishings, is entitled