

circumstances of the parties, and particularly the pecuniary circumstances of the defender, may become materially changed. But while a limitation has been engrafted on the decree for alimony by long practice, the proposal made so to qualify the decree of separation is negatived by immemorial practice to an opposite effect. That being so, I can see no reason for refusing to give effect to the absolute terms which the decree bears.

LORD ADAM—I am of the same opinion. The decree which the defender has obtained, entitles her to live separate from the pursuer in all time coming. In spite of this and of the decree which she holds for alimony if it could have been shown that within the last three hundred years a decree of this kind had ever been treated as temporary in its character. I should have been disposed to have viewed favourably the contention of the pursuer, but any authority which there is is entirely the other way, and that being so I am for adhering to the Lord Ordinary's interlocutor.

LORD M'LAREN—It is clear that this Court can competently pronounce a decree of separation against the spouses which is irrevocable and will be "for all time coming."

The jurisdiction which the Court exercises in this matter is not statutory, but it is founded on the Canon Law, which was adopted in matters consistorial in this country when the Ecclesiastical Courts were abolished at the Reformation.

The law thereafter was administered by the lay courts, but it was the same Canon Law. Such decrees as the one now before us were only pronounced in the most aggravated cases, and after full investigation. Attention has been called to a passage in Lord Fraser's work in which he observes that in less aggravated cases something short of a decree of separation might be pronounced, and it has been sought in the circumstances of this case, on the authority of this *dictum*, to read the present decree with some qualification as to time.

It must, however, be kept in mind that Lord Fraser when compiling his valuable work did not mean merely to confine it to a text-book of the practice of the Court of Session, but rather to build it up on the lines of a philosophical treatise on the relation of husband and wife. He accordingly drew his materials from a variety of foreign sources, and it is of the utmost importance in studying the work carefully to distinguish between these cases when the writer is dealing with the existing law and practice of Scotland, and those when he is treating his subject historically, and giving a statement of the law as it existed in earlier times. These laws are now obsolete and cannot aid us in determining a question arising out of the law and practice of the present day.

What we are asked to do is, in consequence of an alleged change of circumstances, to recal a decree unconditional in its terms, and this I agree with your Lordship cannot be done.

The Court adhered.

Counsel for the Pursuers—J. Comrie Thomson—W. Campbell. Agents—Gill & Pringle, W.S.

Counsel for the Defenders—C. S. Dickson—A. S. D. Thomson. Agents—W. Officer, S.S.C.

Wednesday, October 30, 1889.

OUTER HOUSE.

[Lord Wellwood.]

LAMB v. FIELD.

Heritable Security—Bond and Disposition in Security—Transmission of Personal Obligation against Person taking Estate by Succession—Conveyancing (Scotland) Act 1874 (37 and 38 Vict. c. 94), secs. 12 and 47—Intromission with Rents.

The Conveyancing (Scotland) Act 1874 provides, sec. 12—"Where an heir has before renunciation intromitted with his ancestor's estate he shall be liable for the ancestor's debts to the extent of such intromission, but no further." Section 47—"Subject to the limitation hereinbefore provided as to the liability of an heir for the debts of his ancestor, an heritable security for money duly constituted upon an estate in land, shall, together with any personal obligation to pay principal, interest, and penalty contained in the deed or instrument whereby the security is constituted, transmit against any person taking such estate by succession . . . without the necessity of a bond of corroboration or other deed or procedure, and the personal obligation may be enforced against such person by summary diligence or otherwise in the same manner as against the original debtor."

The heir-at-law of the debtor in a bond and disposition in security for some time after his ancestor's death uplifted the rents of the estate over which the bond was granted, and paid the necessary outgoings, including the interest on the bond. He did not complete a title to the estate, and he renounced the succession. In a suspension of a charge against him at the instance of the bondholder, for the principal sum in the bond, *held* that he had not taken the estate by succession, and that accordingly the personal obligation in the bond had not transmitted against him.

Thomas Lamb, who died in the year 1885, granted a bond and disposition in security in favour of William Field, partner of and trustee for the firm of Field & Allan, slate merchants, Edinburgh, dated and recorded in the Division of the General Register of Sasines for the county of Edinburgh 17th June 1879, for the principal sum of £300 sterling over a dwelling-house situated at No. 11 Melville Terrace, Edinburgh, which

belonged to him. The said bond and disposition in security was assigned by William Field, as sole partner and trustee foresaid, in favour of Henrietta Maria Cameron or Mantica as widow and sole executrix of Anthony Mantica, formerly of Edinburgh, to the extent of £250 sterling, with consequent interest and penalties.

Upon 5th November 1888 John Lamb, the eldest son and heir-at-law of Thomas Lamb, was charged by virtue of a warrant obtained from the Bill Chamber dated the 3rd November 1888 at the instance of William Field, as sole partner and trustee foresaid, and said to be the creditor under the foresaid bond and disposition in security for £300, with consent and concurrence of Henrietta Maria Cameron or Mantica, widow and executrix foresaid.

He brought a suspension of the charge, in which he alleged, *inter alia*—“(Stat. 4) The said charge and whole grounds and warrants thereof are wrongful, illegal, and oppressive. The complainer is not the proprietor of the said subjects, nor is he the debtor in said bond and disposition in security. He is the eldest son and heir-at-law of the said deceased Thomas Lamb, but he has not taken up the succession to his estate, and has not entered into the possession thereof, or made up any title thereto, and he has renounced the succession to the foresaid subjects. Since his father's death he has uplifted the rents thereof, and paid the necessary outgoings, consisting of rates, feu-duties, and others, and the interests upon the said bond in favour of the respondent, and upon a prior bond, but these intromissions were solely had by him under an arrangement or understanding with the bondholders and for their convenience and behoof. The complainer is not *lucratu*s by said intromissions, a statement of which is produced, and which shows the *cumulo* amount of said rents to be £168, and the disbursements therefrom to be £167, 17s. 8d., the apparent balance in the complainer's hands being 2s. 4d., but in the foresaid disbursements are not included any items for repairs, such as painting and papering, which cost the complainer upwards of £20, and several smaller items, including a kitchen range supplied by him for the house, and which cost £4, 10s. Before instituting the present proceedings, and all along, the respondent was well aware that there were no funds in the complainer's hands arising from his said intromissions, and the complainer has already accounted to him therefor. In consequence of the present proceedings the complainer declined to intromit further with the rents of said subjects, but under an arrangement with the respondent, he, without prejudice, uplifted the half-year's rent due at the term of Martinmas 1888, and made the necessary payments therefrom, including the interest due upon the foresaid bond.”

To which the respondents answered—“The proceedings complained of were legal and regular in all respects. The complainer, as heir of the deceased Thomas Lamb, in 1855 entered into possession of the heritable subjects con-

veyed in the said bond, and has ever since continued to possess them as owner thereof. Not known and not admitted that he has renounced the succession to his father's estate, and averred that at least he had not done so prior to the date of the institution of the proceedings complained of. Denied that the complainer's intromissions with the rents of said subjects were had by him under an arrangement or understanding with the bondholders. The statement of intromissions produced by the complainer is referred to. Explained that it relates only to complainer's intromissions with the rents of said subjects. Denied that the respondent was aware that there were no funds in complainer's hands arising from his intromissions with the late Mr Thomas Lamb's estate. It is believed and averred that the complainer has had intromissions with the deceased's estate not accounted for in the said statement. The complainer has repeatedly requested particulars of these other intromissions, but the complainer has refused to furnish them. The respondent again calls on the complainer to supply these particulars.”

The complainer pleaded, *inter alia*—“(1) The complainer not being the proprietor of the said subjects, nor the debtor in said bond, he is not liable to the respondent in the sums charged for. (2) The complainer having renounced the succession to the foresaid subjects, and accounted to the respondent for his intromissions with the rents thereof, there is no further liability on his part in connection therewith.”

The respondents pleaded—“(1) The note should be refused in respect (a) that the whole proceedings complained of are regular and legal; (b) that the complainer took up the succession to the late Thomas Lamb's estate, has not renounced the succession, and has not accounted for the value of the deceased's estate intromitted with by him; and (c) *separatim*, that assuming that the complainer has renounced the succession, he has not duly accounted for his intromissions with the deceased's estate.”

The Conveyancing (Scotland) Act 1874 (37 and 38 Vict. cap. 94), section 12, provides that “An heir shall not be liable for the debts of his ancestor beyond the value of the estate of such ancestor to which he succeeds, and if an heir shall renounce the succession, the creditors of the ancestor shall have the same rights against the estate as upon a renunciation, according to the law before the commencement of this Act. When an heir has, before renunciation, intromitted with the ancestor's estate, he shall be liable for the ancestor's debts to the extent of such intromission but no further.” Section 47 of said Act further provides that “Subject to the limitation hereinbefore provided as to the liability of an heir for the debts of his ancestor, an heritable security for money duly constituted upon an estate in land shall, together with any personal obligation to pay principal, interest and penalty contained in the deed or instrument whereby the security is constituted, transmit against any person taking such estate by succession, gift, or bequest, or by

conveyance, when an agreement to that effect appears *in gremio* of the conveyance, and shall be a burden upon his title in the same manner as it was upon that of his ancestor or author, without the necessity of a bond of corroboration, or other deed or procedure, and the personal obligation may be enforced against such person by summary diligence or otherwise, in the same manner as against the original debtor."

On the 30th October 1889 the Lord Ordinary (LORD WELLWOOD) pronounced the following interlocutor:—"Finds that the complainer not having completed a title to the heritable subject over which the bond and disposition in security condescended on was granted by his father the deceased Thomas Lamb, he has not taken the said estate by succession within the meaning of the 47th section of the Conveyancing Act of 1874: Therefore finds that the personal obligation in the said bond and disposition in security has not transmitted against the complainer and that the charge sought to be suspended was incompetent and illegal: Therefore sustains the first and third pleas-in-law for the complainer, and suspends the said charge and whole grounds and warrants thereof: Finds the complainer entitled to expenses, &c.

"*Opinion.*—The legality of the charge which is sought to be suspended depends upon whether the complainer has, in the sense of the 47th section of the Conveyancing Act of 1874, 'taken by succession' the estate over which the bond and disposition in security condescended on was granted by his father. It appears to me that on a sound construction of that clause it is unnecessary, in order that the personal obligation in a bond and disposition in security granted by the ancestor should transmit against an heir, that the heir should have completed a title to the estate by the service or otherwise, which admittedly the complainer has not done. The object of the 47th section was simply to obviate the necessity of constituting the debt against the heir or obtaining a bond of corroboration from him. The language used in the 47th section and in Schedule K bears out this view. After providing that an heritable security shall, together with any personal obligation contained in the deed whereby the security is constituted, transmit against any person taking the estate by succession, it is provided that it "shall be a burden upon his title in the same manner as it was upon that of his ancestor or author without the necessity of a bond of corroboration or other deed or procedure." And in Schedule K, which contains a form of minute for warrant to charge an heir or disponee under a personal obligation by his ancestor or author, the person sought to be charged is designed as 'the present proprietor of the said lands, and as such the present debtor in the said bond and disposition in security.' It appears to me, therefore, that as a condition of the transmission of the obligation, followed as it will be by the serious consequences of summary diligence, it is contemplated that a formal title must have

been made up to the subjects by the person sought to be charged.

"I do not think that this question is affected by the provisions of the 9th and 12th sections of the statute. The 9th section simply provides that the personal right to an estate in land shall vest without service; but this alone does not involve the transmission against the heir of the personal obligation in his ancestor's bond. Vesting which takes place without the heir's consent and perhaps without his knowledge is not equivalent to taking up the succession. Again, in section 12 it appears to be contemplated that the heir may intromit with the ancestor's estate and yet be entitled to renounce, subject to liability to the extent of his intromissions. It would thus appear that mere intromission with the estate does not constitute 'taking by succession' in the sense of the statute.

"I express no opinion as to the validity of the respondent's claims against the complainer in respect of his intromissions, either with the heritable or moveable estate of his father. Those may be made good in another process. I only decide, for the reasons above stated, that the charge sought to be suspended was incompetent and illegal."

Counsel for the Complainer—Strachan.
Agent—W. T. Sutherland, S.S.C.

Counsel for the Respondents—Wilson.
Agents—Somerville & Watson, S.S.C.

Saturday, November 30.

OUTER HOUSE.

[Lord Kincairney.

CARRUTHERS, PETITIONER.

Entail—Provision for Younger Children—Free Rental.

By a deed of entail power was given to the heirs of entail "to provide their children, one or more, other than and beside the heir succeeding thereto, in portions or provisions not exceeding in whole three years' free rental of said lands and estate, to be computed and as the same shall extend at the decease of the heir of entail granting such deed of provision." An heir of entail having made a provision for his daughter by virtue of this power, the succeeding heir of entail presented a petition for power to charge the estate with the amount of the provision, in which he alleged that the amount of the provision was within three years' rental of the estate unless he were entitled to deduct "one-third of the clear rents assigned or about to be assigned by him to a creditor in respect of Montgomery improvements under section 16 of the Montgomery Act." The debt in question consisted of improvement expenditure made during the lifetime of the preceding heir, but had not been consti-