

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terms of an agreement into which the whole parties interested had entered, relative to the revenue, and *quoad ultra* superseded consideration of the petition.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.