whether the proceedings were civil or criminal he gave no opinion.

Agent for Pursuer—

Agents for Defenders—Maclachlan & Rodger, W.S., and Maconochie & Hare, W.S.

Friday, December 18.

SECOND DIVISION.

LANG *v.* LANG.

(*Ante, p.* 20.)

Conjugal Rights Act 1861—*Common Law—Custody of Children—Final Decree.* Held that a decree exhausting the merits in an action of separation and aliment was a final decree in the sense of the Conjugal Rights Act, and that after such decree is pronounced it is incompetent, both at common law and under the Act, to make a motion to the Lord Ordinary or the Court providing for the custody of children.

In this case the Court some time ago pronounced decree of separation *a mensa et thoro* in favour of the wife, on the ground of the husband's cruelty. The case then was brought before the Lord Ordinary on the question of aliment, and his Lordship having found the wife entitled to £100, a reclaiming note was boxed against the Lord Ordinary's interlocutor, and the Court modified the award of the aliment. The pursuer of the action (wife) then make a motion before the Lord Ordinary (JERVISWOODE) praying for an order to regulate the custody of two of the pupil children of the family. The Lord Ordinary appointed the children to be under the custody of the mother. The defender reclaimed.

PATTISON and CRICHTON for her.

CLARK and BLACK in answer.

The Court held that the Lord Ordinary had no power, either under the Conjugal Rights Act or at common law, to entertain this motion after final decree had been pronounced in the action, and accordingly recalled the Lord Ordinary's judgment. Lord Benholme was absent, but his dissent, on the ground of the expediency of recognising the power of the Court to deal with such a matter, was intimated by the Lord Justice-Clerk.

In answer to a question by Mr Clark, it was stated by the Lord Justice-Clerk that it was not contemplated that in such an action, or in an action of divorce, there should be conditions applicable to the custody of children.

Agent for Pursuer—W. H. Muir, S.S.C.

Agent for Defender—James Young, S.S.C.

Saturday, December 19.

BUTLER-JOHNSTONE *v.* JOHNSTONE AND OTHERS.

Entail—Interpolation—Clause of Devolution. Held (1) that the fetters of an entail cannot be effectually imposed by a supplementary deed referring to the deed containing the conveyance of the lands, but not itself containing any conveyance of the said lands, although the said two deeds were intended by the grantor to be read together as a *mortis causa* disposition and settlement of the lands in question; (2) (altering Lord Jerviswoode) that the interpolation of the word "not" in the clause prohibiting the alteration of the order of succession was fatal to the validity of the entail; (3) (diss. Lord Justice-Clerk) that the deed of entail being invalid, a clause of devolution was not binding on the heir in possession of the estate.

This was an action brought by the Hon. Mrs Butler Johnstone Munro, heiress of entail in possession of the estates of Corehead and others, in the county of Dumfries, to have it found and declared that she was entitled to hold these estates in fee-simple, and free from the fetters of the entail thereof, and free from the obligation contained in a clause of devolution inserted in the entail.

There were three deeds. The first dated in 1796 contained a conveyance of the estate in favour of a series of heirs, but without any fettering clauses. The second deed, dated in 1799, and which bore to be a supplementary deed of entail, contained no conveyance of the estate, but referred to the previous deed of 1796, ratified all its provisions, and declared that the lands conveyed by it (the first deed) should be held under the fetters of a strict entail as set forth in it (the second deed). The third deed, dated in 1800, was a conveyance of the same estates, by the heirs of entail then in possession, in favour of the series of heirs mentioned in the first deed, and under the fetters of a strict entail. The first and third deeds further contained a clause of devolution, providing that every heir of entail who came to be the heir or apparent heir or representative of Sir Alexander Munro should be bound and obliged to divest himself or herself of the estates, and to convey the same to the person next entitled thereto, according to the destination in the entails. The pursuer pleaded that as the deed of 1796 contained a conveyance of the estate, but no fettering clauses, it could not be regarded in any sense as an entail, and that it could not have that character conferred upon it by the supplementary deed of 1799, which contained the fetters of the entail but no conveyance of the lands. With regard to the deed of 1800, she pleaded that the same contained no effectual prohibitory clauses, inasmuch as the word *not*, occuring in the clause prohibiting the alteration of the order of succession, was interpolated, and therefore, that the whole entail was ineffectual under the provisions of the Rutherfurd Act. She further pleaded that the clause of devolution was inapplicable and not binding upon her—she not possessing the character pointed at, and the clause being, moreover, only part of a destination which was not protected by effectual fettering clauses.

The defender pleaded that the deeds of 1796 and 1799 together constituted a valid entail of the estates, that the deed of 1800 was a valid and effectual entail, and not challengeable on the ground stated; and that, in any event, the clause of devolution was binding upon the pursuer, as, in consequence of the death of her brothers without issue, she had acquired the character of heir and representative of Sir Alexander Munro in the sense of that clause.

The Lord Ordinary (JERVISWOODE) pronounced the following interlocutor:—"The Lord Ordinary having heard counsel and made avizandum, and considered the record and whole process—sustains the 3d and 4th pleas in law stated on the part of the defenders, and also the 5th plea for them, to the effect thereby maintained, that the deed of 1800 is duly executed and authenticated in terms of