

in his settlement as the date of division, the children's shares vested at that date.

Counsel for the Parties—Dickson—Vary Campbell. Agents—J. Stewart Gellatly, L.A.—Henry Buchan, S.S.C.

Thursday, June 2.

## SECOND DIVISION.

[Sheriff of Caithness, Orkney,  
and Zetland.]

### CHRISTISONS v. CHRISTISON.

*Succession—Executor—Writ.*

Terms of writ held to constitute a universal legatory, and to entitle the person so favoured to be deemed executor in a competition with the next-of-kin for that office.

Hugh Christison, a shepherd residing at Steenswall, Zetland, died on 27th December 1880 leaving a will in the following terms:—

“October 18 1879 Hugh Christison

this Will I writ with my own free will and accord all siller and stok remains too the oldest liver Both sard if thir be aney over the wifes frindes get the third part of it my frindes getes the rest and every thing within the hous of hires and min goes too my frindes both agrabel for this.

“HUGH CHRISTISON SALLY CHRISTISON.”

Thereupon competing petitions were presented in the Sheriff Court of Caithness, Orkney, and Zetland by his brothers John and David Christison on the one side, who sought to be deemed executors-dative *qua* next-of-kin to the deceased, and by his widow Sarah Bertie Christison on the other side, who sought that office *qua* general disponee of her deceased spouse under the holograph writ. The Sheriff-Substitute (RAMPIN) deemed in favour of the brothers *qua* next-of-kin to the deceased. The widow having appealed, the Lords recalled the Sheriff-Substitute's interlocutor, being of opinion that as under the will she was the fiar of the property, she was entitled to be served executrix dative *qua* universal disponee.

Counsel for Appellant—Darling. Agent—Charles S. Taylor, S.S.C.

Counsel for Respondents—Galloway. Agent—Thomas Carmichael, S.S.C.

Thursday, June 2.

## SECOND DIVISION.

[Sheriff of Midlothian.]

### RITCHIE v. M'INTOSH.

*Bankruptcy—Trust for Creditors—Process—Caution for Expenses.*

The Court will not ordain a pursuer who has executed a trust-deed for behoof of his creditors to find caution for expenses in an action of count and reckoning against his trustee.

George M. Ritchie, residing in Leith, presented a petition in the Sheriff Court of Midlothian against Alexander M'Intosh, his trustee under a trust-deed executed for behoof of creditors on 6th April 1878. In it he prayed the Court to ordain the defender to produce a full account of his intromissions as trustee aforesaid, and to pay to him the sum of £800 sterling, or such other sum as should appear to be the true balance due by him.

The defender, *inter alia*, pleaded that the pursuer being insolvent, and having denuded himself of his whole estate, was bound to find caution before proceeding further with the action.

The Sheriff-Principal (DAVIDSON), affirming the Sheriff-Substitute (HALLARD), assolizied the defender, in respect of the pursuer's failure to comply with a previous order of the Court enjoining him to find caution for expenses.

The pursuer appealed, and the defender founded on the cases of *Harvey v. Farquhar*, July 12, 1870, 8 Macph. 971; *Horn v. Sanderson & Muirhead*, Jan. 9, 1872, 10 Macph. 295, as authorities for the Sheriff's judgment.

At advising—

LORD JUSTICE-CLERK—In the question as it is presented here I see no difficulty whatever, because the trustee is only the creature of his author, from whom he has received the estate. He cannot, therefore, say that by receiving the estate he has so divested his author as to prevent him from suing unless he consents to find caution for the expenses of the action. I am therefore for recalling the judgments brought under review.

LORD YOUNG—I am entirely of the same opinion. I have read the Sheriffs' judgments with something like amazement. They have quite misapprehended the law on the subject. It is according to the practice of this Court not to allow a party who is divested of his property to sue actions except on condition, and not always on condition, of finding caution for the expenses of the action. The reason of this rule of practice is that the person so divested is seeking to recover to himself something included in a conveyance to another. For example, a bankrupt who has been sequestrated, and so completely divested of his estate in favour of his trustee in bankruptcy, has sometimes brought an action saying, “No doubt the trustee is the proper person to bring the action, because the right is vested in him, but he improperly refuses to do so, and I ask leave to bring the action myself.” In such a case the Court may or may not allow him to do so, but only on condition of his finding caution for the expenses of the action. This observation, moreover, equally applies in the case of a person who has divested himself by a voluntary trust-deed. But in this case the person divested is suing his own trustee to have him ordained to pay over a balance on his estate, which he says lies in his trustee's hands. Can it be said that such a person's right has been so conveyed away to that trustee that he shall not be entitled to sue the action? If the action is proper, then he, and no one else, is interested in it. The right is in him, and he is seeking to make it good. To say that he is not entitled to do so without finding caution for the expenses is to assert a proposition outwith all authority and good sense.

There is, no doubt, a discretion in the hands of the Court—which is, however, but charily exercised—to make a party suing find caution for expenses; but I remember hearing the first Lord Mackenzie observe, that while a man's conduct in a cause may induce the Court to order it, absolute impecuniosity alone will not be held a sufficient reason.

I have been induced to make these few observations, as I have been struck by the erroneous impressions which the Courts below seem to have held on the matter.

LORD CRAIGHILL concurred with their Lordships.

The Lords therefore sustained the appeal, recalled the judgment of the Sheriff, and remitted to the Sheriff to proceed.

Counsel for Appellant—Nevay. Agent—Robert Broatch, L.A.

Counsel for Respondent—Shaw. Agent—David Forsyth, S.S.C.

Wednesday, June 1.

## SECOND DIVISION.

SPECIAL CASE—WILL AND OTHERS (LOWDEN'S TRUSTEES) v. LOWDEN AND OTHERS.

*Husband and Wife—Antenuptial Marriage-Contract—Provisions Increased by Subsequent Trust-Deed.*

By an antenuptial contract of marriage it was provided that in case of the predecease of the husband the trustees should pay to his wife £150, which sum she accepted in full of all her legal claims against him or his estate as his widow or otherwise; (2) that the remainder of his whole estate should be divided equally between his children by a former marriage and any child or children to be born by his then contemplated marriage. Four years after, when two children had been born of the marriage, he, with his wife's concurrence, executed a trust-deed and settlement and two codicils thereto, in which, besides increasing the provision already made to her, he gave her the liferent of the shares of his estate falling to her own two children, subject to the burden of alimentering them till they were able to maintain themselves. Held that such reasonable provision for his wife was not barred by the terms of his marriage-contract.

Peter Lowden, merchant in Dundee, died on 17th October 1880. He was thrice married, and was survived by his widow Mrs Margaret Wisely Coupar or Lowden; by three children born of his first marriage, viz., Peter Lowden, John Davidson Lowden, and Mrs Mary Ann Lowden or Greig; and by two children born to him of his third marriage, viz., Catherine Kidd Lowden and Rebecca Baxter Smith Lowden. By his second marriage he had no issue.

On 9th March 1870 he entered into and executed an antenuptial contract, whereby in contemplation of his marriage with Miss Margaret Wisely,

who became his widow, he disposed his estates as at his death to certain trustees, in trust for the ends, uses, and purposes thereinafter mentioned, viz., (First) Payment of his debts, funeral expenses, &c. (Second) That my said trustees shall, as soon as convenient after my death, pay to the said Margaret Wyseley Coupar the sum of £150 in full of all legal claims which she may be entitled to, and of which sum she, by her signature hereto, hereby accepts in full of all her legal claims against me or my said estate as my widow or otherwise. (Third) Regarding the remainder of my said estate, I direct my trustees, in the event of there being any children of this marriage, to alimenter and educate them out of the common fund until the youngest arrives at the age of twelve years, and on such age being attained by the youngest, then I direct my said trustees to divide my whole estates equally, share and share alike, between my children got by marriage with Elizabeth Mudie [his first wife], and any child or children who may be born by my present contemplated marriage, giving to my said trustees, as I hereby give discretionary powers to them to mete out or invest the share which may fall to the child or children of this contemplated marriage for their best advantage, and until such time as they may think it prudent to hand over such share to the before-mentioned children. (Fourth) My said intended spouse shall be entitled, in the event of her surviving me, to get delivery from my trustees of all the property and articles which she may bring to me at the time of our marriage. . . . And (Lastly), and as this contract is also my settlement, I recall all other settlements or contracts I have made."

On 17th July 1874 he executed a trust-disposition and deed of settlement, which was also at the same time subscribed by his wife as approving of the same, in which he disposed his whole means and estate then belonging to him, or which should belong to him at the time of his death, to Adam Will and others, as trustees for the ends, uses, and purposes therein mentioned. In the second purpose he directed his trustees, as soon as convenient after his death, to convey and dispose, absolutely and irredeemably, and at the expense of his trust-estate, to his wife Mrs Margaret Lowden, in the event of her surviving him, and to her assignees whomsoever, a dwelling-house, grounds, and pertinents situated on the east side of Albert Street, Dundee, then occupied by himself. He likewise directed his trustees, as soon as convenient for them after his death, to pay to her the sum of £150 in full satisfaction of the provision of that amount in her favour, as contained in the said antenuptial contract of marriage between him and her; as also, in terms and in satisfaction of the clause or provision to that effect contained in the said contract, to allow her to get delivery of all the property and articles which she brought to him, or with her, at the time of their marriage. And he further directed his trustees, besides and in addition to the provisions now above narrated, to allow to her the free liferent use of the whole household furniture, bed and table linen, and other household effects, including silver plate, and likewise printed books and articles of an ornamental description, that should belong to him at the time of his death, but such liferent was to ter-