at 70 Waddell Street. The pursuer avers that there was formerly a William Cruickshank or Cruickshanks at 70 Waddell Street, and he believes that the latter, who was a tailor, must be the debtor of the defenders." He further stated that he had lived seven years at 78 Waddell Street, and had never dealt with the defenders or received any account from them until that rendered with the summons, and that his credit and feelings had been injured by the publication of the decree in the local newspapers.

The defenders admitted that the summons was against "William Cruickshanks." They stated that their decree was against the pursuer, that it was obtained on 5th August, and that he was charged on it on 6th August.

They pleaded, *inter alia*—"(3) The pursuer not having taken the usual means of having the decree reviewed, he is not entitled to have the same set aside now, as the judgment has become final, and is not open to review."

The pursuer, in obedience to an interlocutor of the Sheriff-Substitute, consigned the sum of £12, being the amount contained in the decree.

On 27th August 1886 the Sheriff-Substitute (SPENS) sustained the third plea-in-law stated for the defenders, and assoilzied them.

"*Note.*—It seems to me that unless the pursuer got an express undertaking from the defenders to withdraw the action he ought to have appeared in Court to state that the goods were not supplied to him. Rightly or wrongly by serving the action upon him the defenders had indicated that he was the party to whom they were looking for payment. But even assuming that he had grounds for believing that the defenders had departed from their action, what excuse can be made for not seeing to the case being sisted when he was charged upon the decree in absence. I have therefore come to the conclusion that, assuming the pursuers' story to be all true, he has lost his remedy by not taking the ordinary means of bringing up the decree in absence for review."

On appeal the Sheriff (BERRY) on 12th July 1887 adhered.

The complainer appealed, and argued that the case was ruled by the case of *Brown* v. *Rodger*, December 13, 1884, 12 R. 340. There a mistake in the defender's name led to a suspension of the proceedings, and the Court refused to allow proof of an averment that the suspender had been personally cited and charged on the decree—*Spalding* v. *Valentine*, July 4, 1883, 10 R. 1092.

Argued for the respondents—The decree was against the pursuer. The mistake—Cruickshanks for Cruickshank—was trifling, and was no excuse for the appellant not defending the action. If the defence was good on the merits it should have been stated. This was an attempt to get the case re-heard. The only way to do that was under the Small Debt Act 1837 (1 Vict. c. 41), sec. 16.

At advising—

LORD JUSTICE-CLERK—I think the appellant has himself to blame. It seems that he, though the summons was served upon him, and the account as well, took no proper steps to have the alleged error rectified. I do not see that we are justified in interfering.

LORD CRAIGHILL—This man got the summons and the account. There was the same alleged error of name in both. But if he had looked he would have seen that the account showed that there had been a payment to account of the debt. That might have given him further information. But he remained at home, and took no further steps to prevent decree being taken against him. I think he has now no answer to Gow & Sons' claim.

LORD RUTHERFURD CLARK—I think the only question is, whether there is or is not a decree against the pursuer of this action. If there is, then it can be enforced against him, and that being so, we cannot enter on the merits. But it is said—and I think it is the only thing which can be said—that the decree is no decree against the pursuer, because the only decree which exists, and is said to be against him, does not set out his name correctly. If that is well founded in law, I think that the pursuer is entitled to redress. The question then comes to be, whether when the summons was left at the pursuer's house, and was erroneous to the extent only of the name being spelt "Cruickshanks" instead of "Cruickshank," he was entitled to disregard it, and assume that it was not intended for him at all, and that the decree would not affect him. I do not think he was entitled to take up that position. I think a person in the pursuer's position must know if a summons is intended for him, and if the objection to it is a good one, he is bound to appear and state it. If not, the decree which is pronounced against him notwithstanding the error, will avail against him.

The Court dismissed the appeal, affirmed the interlocutors of the Sheriff-Substitute and the Sheriff appealed against, and of new assoilzied the defenders from the conclusions of the action.

Counsel for the Appellant—Fleming. Agents—Winchester & Nicolson, W.S.

Counsel for the Respondents—Shaw. Agents—M'Gregor & Cochrane, S.S.C.

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*Wednesday, February* 8.

## SECOND DIVISION.

### LYON *v.* LYON.

*Succession—Simple Substitution—Evacuation.*

A testator disponed his heritable property to his sister Margaret, but provided that if Margaret should marry or predecease his sister Ann, then in the first case, Ann should receive the half, and in the second, the whole property, provided that if both died without marrying, the property should go in equal shares to his two brothers George and David, or their heirs and successors. Both sisters survived the testator. Ann predeceased Margaret. Margaret died unmarried, leaving a settlement disposing, *inter alia*, of the whole heritable estate. In a competition between the heir under Margaret's

settlement and the representatives of the testator's brothers George and David—*held* that an absolute and indefeasible fee in the heritable properties left by the testator had been conferred on Margaret, with a simple substitution in favour of the testator's brothers George and David, their heirs and successors, which substitution had been effectually evacuated by Margaret's settlement.

John Lyon, classical master of the High School, Leith, died on 18th March 1847, leaving a settlement dated 13th November 1841, with a codicil thereto dated 19th August 1842.

By the settlement he disponed to his sisters, Ann Lyon and Margaret Lyon, and the survivor of them, and the heirs and assignees of the survivor, his whole estate, heritable and moveable, and particularly a dwelling-house in Vanburgh Place, Leith, and a dwelling-house at 45 Lothian Street, Edinburgh, as therein described, and he also thereby nominated his said disponees his sole executors. No trustees were appointed, and no legacies or directions were mentioned therein.

The codicil was in these terms—"Whereas upon the 13th November 1841 I disponed all my property to my two sisters Ann and Margaret Lyon, yet upon considering that my sister Ann is at present provided for, and that my aunt Margaret Brown is entirely dependent, I so far alter my foresaid disposition as to grant, assign, and dispone the whole which I may possess at my death to my sister Margaret, if my sister Ann is still provided for as she is at present, or otherwise by marriage, under the condition that she, Margaret, shall support her aunt Margaret Brown all the days of her natural life, and if she, Margaret Lyon, do marry or predecease my sister Ann, then in the first case, she, Ann Lyon, shall receive the half, and in the second, the whole property, &c.; provided always, that if both die without marrying, the property shall go in equal shares to my two brothers, George and David, or their heirs and successors. This codicil I write on the 19th day of August 1842 years (signed) JOHN LYON."

On 18th January 1849 an instrument of sasine was expede and recorded on behalf of Ann and Margaret Lyon as regards the Vanburgh Place property, and on 12th August 1850 an instrument of sasine was expede and recorded as regards the property in Lothian Street. In both instruments of sasine the settlement and codicil were narrated, and sasine was given in the following terms:—"In virtue of which precept I hereby give sasine to the said Ann Lyon and Margaret Lyon, and the survivor of them, of the subjects and others above described, but always under burden of the codicil and addition and alteration and provisions and declarations and conditions thereof before specified;" those being the conditions mentioned in the codicil.

Ann Lyon died unmarried on or about 24th February 1886. She and Margaret Lyon had executed a mutual settlement on or about 29th June 1874, by which they conveyed their moveable estate to the survivor, but no disposition was made of heritage. Margaret Lyon died on or about 14th February 1887 unmarried, leaving a settlement dated 5th May 1886, by which she left and bequeathed to her nephew David Lyon, son of her late brother David Lyon, whom failing his issue equally, *inter alia*, the whole heritable property of which she might die possessed.

After Margaret Lyon's death this special case was presented, to which the parties were (1) David Lyon, who was the eldest son and heir-at-law of the deceased David Lyon, mentioned in the codicil, and (2) Robert Lyon, the eldest son and heir-at-law of the deceased George Lyon, also mentioned in the codicil, to whom and their heirs the testator John Lyon directed that his heritable properties should go in the event of his sisters both dying without being married. David Lyon the elder and George Lyon both predeceased Ann Lyon and Margaret Lyon.

It was maintained by the first party that his aunt Margaret Lyon was fiar of the heritable properties, and as such entitled to dispose of the same by deed *inter vivos* or *mortis causa*, and that having by her settlement conveyed the same to him solely he was entitled thereto to the exclusion of his cousin the second party; while the latter maintained that the codicil validly imposed a limitation on the absolute fee conferred by the prior settlement on Ann and Margaret Lyon, which limitation was duly engrossed in the sasines expede by them; that Margaret Lyon was not therefore entitled to, and could not defeat his right of succession, and that he was entitled to an equal *pro indiviso* share of both of the properties with the first party in terms of the codicil.

The questions of law were as follows—"(1) Do said heritable properties belong equally to the first and second parties to this case? Or (2) Do they belong solely to the first party?"

Argued for the first party—Under the codicil Margaret Lyon was made absolute fiar subject to two conditions, that she should not marry, and that she should not predecease Ann her sister. Neither of these conditions were fulfilled. The last clause of the codicil, on a sound construction, only applied in the event of Margaret predeceasing Ann. It did not import a third independent condition. If George and David Lyon, their heirs and successors, were to be taken as conditional institutes, then Margaret by succeeding had evacuated the destination to them; if they were substitutes, then her settlement had evacuated the substitution, the substitutes' right being unprotected.

Argued for the second party—(1) This was a case of protected substitution which was good in law against the voluntary acts of the institute—Ersk. iii. 8, 22. Such a restricted right in the institute was, looking to the words of the codicil expressed therein, but in any case such a restriction might be implied—*Dyer* v. *Carruthers*, May 27, 1874, 1 R. 943, and was here implied. (2) Alternatively, this was a case of a fee vested in Margaret, but subject to defeasance in the event which happened, of her death unmarried—*M'Lay* v. *Borland*, July 19, 1876, 8 R. 1124.

At advising—

LORD JUSTICE-CLERK—I have had little difficulty here. I think this is an unfenced destination merely in favour of the substitutes George and David Lyon, their heirs and successors, and that the substitute Margaret Lyon was free to dis-

pose of the heritable property as she chose She did dispose of it in favour of the first party, who is consequently in my opinion entitled to prevail.

LORD CRAIGHILL—I concur. I think that the intention of the codicil was to give Margaret Lyon a fee in the whole heritable property, which left her free to dispose of it if she chose, though if she did not dispose of it, it went to George and David Lyon as substitutes.

LORD RUTHERFURD CLARK—This is about as plain a case as I can well imagine. It is nothing else than a case of simple substitution in favour of George and David Lyon, and it is quite clear that Margaret Lyon the substitute has evacuated that substitution.

LORD YOUNG was absent

The Court answered the second question in the affirmative.

Counsel for the First Party—James Reid. Agents—Macpherson & Mackay, W.S.

Counsel for the Second Party—Wilson. Agent—James Ayton, Solicitor.

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*Wednesday, February 8.*

## FIRST DIVISION.

[Lord Fraser, Ordinary.

## STEWART *v.* FORBES AND OTHERS.

*Trust—Adjudication of Trust-Estate—Expenses of Litigation in connection with Trust-Estate.*

*Held* competent to lead an adjudication against a trust-estate upon a decree for expenses obtained against the trustees in a litigation in connection with the trust-estate.

*Process—Adjudication—Recording of Abbreviate.*

In an action of adjudication defences were lodged for two of the defenders, and thereafter, in respect of no appearance, the Lord Ordinary pronounced decree of adjudication against them. Decree in absence was then taken against the other defenders, which was afterwards recalled, and they were allowed to lodge defences. Decree of adjudication was thereafter pronounced against them, and on a reclaiming-note this was adhered to. The Court, in respect the decree against the first set of defenders had been pronounced more than sixty days before the date of their judgment, within which period the abbreviate required to be recorded, pronounced decree of adjudication *de novo* against them.

In November 1886 Malcolm Stewart, the superior of certain subjects in Grange Place, Edinburgh, raised an action of declarator of irritancy *ob non solutum canonem* and removing against Mrs Elizabeth West or Forbes, William Moncur, and John Howie, the trustees under a trust conveyance and deed of settlement granted by Mrs Forbes, and relative deed of assumption and conveyance, as trustees; against Mrs Forbes as an individual and as liferenter of the subjects; and against her husband Alexander Forbes, for his interest as an individual, and as administrator-in-law for his wife, and for the children of the marriage, and also against the children themselves. The summons set forth that the feu-duty for the last two years was unpaid, and concluded for expenses against the defenders, in the event of their appearing and opposing the conclusions thereof. Defences were lodged by the trustees, and by Mrs Forbes as an individual.

On 3d February 1887 the Lord Ordinary (FRASER) pronounced an interlocutor, holding (in respect the feu-duties had then been paid) the irritancy to be purged, and finding the compearing defenders liable in expenses.

On a reclaiming-note the First Division adhered to this interlocutor. The sum of expenses to which the pursuer was found entitled amounted to £43, 7s.

In December 1887 Stewart brought an action of adjudication upon this debt, of the subjects in Grange Place, the defenders called being the trustees, Mrs Forbes as an individual, and Alexander Forbes for his interest, and as administrator-in-law for his wife.

The pursuer averred that a charge had been given upon the extract decree for expenses, but that he had failed to recover any part of the sum due to him, and that the defender Alexander Forbes was an undischarged bankrupt.

Defences were lodged for Moncur and Howie.

On 26th November 1887 the Lord Ordinary, in respect of no appearance for the compearing defenders, adjudged, decerned, and declared against them conform to the conclusions of the summons.

On 30th November 1887 the Lord Ordinary adjudged, decerned, and declared in absence against the defenders Mr and Mrs Forbes.

On 14th December 1887 the Lord Ordinary, on the motion of the defenders Mr and Mrs Forbes, recalled the decree in absence, and allowed them to lodge defences, which they did.

The defenders averred that the subjects referred to belonged to Mrs Forbes in liferent, and to the children of the marriage in fee; that no defences were lodged for the children to the previous action, and that yet it was sought to make them pay the expenses personally incurred by the trustees; that the trust-estate was not liable for these expenses, but only the trustees, who were willing to pay the debt out of the rents of the trust property.

The pursuer pleaded that as the defenders were resting-owing to him in the sum condescended on, conform to the extract decree, he was entitled to decree of adjudication.

The defenders pleaded, *inter alia*—"(5) The subjects mentioned in the summons not being in any way subject to or liable for the said sum of £43, 7s., decree of adjudication should not be pronounced."

On 14th January 1888 the Lord Ordinary repelled the defences, and adjudged, decerned, and declared against them conform to the conclusions of the summons.

"*Opinion.*—The trustees acting under a trust conveyance and deed of settlement by Mrs Elizabeth West or Forbes, and relative deed of assumption and conveyance, did, in their character as trustees, with the view as they thought of defending the trust-estate, enter into a litigation in