

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.