

who was present at the hearing has authorised me to say that he concurs in the opinion of the Court.

LORD YOUNG and LORD LEE were absent at the hearing of the cause.

The Court adhered.

Counsel for the Reclaimer—Rhind—M'Kechnie. Agents—Menzies, Bruce Low, & Thomson, W.S.

Counsel for the Respondent—R. V. Campbell—Salvesen. Agent—D. Lister Shand, W.S.

Wednesday, March 19.

## SECOND DIVISION.

### STEWART v. KERR.

*Executor-Dative—Confirmation—Competing Claims—Exclusion of Husband—Married Women's Property (Scotland) Act 1881 (44 and 45 Vict. c. 21), sec. 6.*

Held that the brother of a married woman dying intestate and without children has a right to be confirmed executor-dative *qua* next of kin to the exclusion of the husband.

Miss Jessie Kerr or Stewart, wife of Kenneth Stewart, 48 Breadalbane Street, Glasgow, died there intestate and without lawful issue on 20th December 1889. Her whole personal estate and effects, without deduction of debts or funeral expenses, did not exceed the value of £300.

The said Kenneth Stewart presented a petition in the Sheriff Court at Glasgow praying to be appointed executor-dative *qua* husband of the deceased. John Kerr, plumber, Springfield Terrace, Dunblane, brother of the deceased, presented a petition in the same Sheriff Court to be appointed executor-dative *qua* one of the next of kin.

The Married Women's Property (Scotland) Act 1881 (44 and 45 Vict. c. 21) enacts by sec. 6 that "after the passing of this Act the husband of any woman who may die domiciled in Scotland shall take by operation of law the same share and interest in her moveable estate as is taken by a widow in her deceased husband's moveable estate, according to the law and practice of Scotland, and subject always to the same rules of law in relation to the nature and amount of such share and interest, and the exclusion, discharge, or satisfaction thereof, as the case may be."

The Sheriff-Substitute (SPENS) dismissed the husband's petition and decerned the brother executor-dative.

"Note.—In this case the husband of the deceased claims to be executor in preference to the next of kin. Such, at all events, is the position taken up, as I understand, by the agent for the husband. The argument addressed to me was, that as everything belonging to the wife previous to the passing of the Married Women's Property Acts of 1877 and 1881 fell under the *jus mariti* of

the husband, he was entitled still to the end of his life to administer the whole estate left by his deceased wife, the statutes referred to not affecting his right as to this. I confess I do not follow this argument. The wife being intestate at the date of her death, an executor-dative must be appointed to her estate. The husband, under the Married Women's Property Act of 1881, sec. 6, has a beneficial interest in her estate, the same as she would have had in his estate had he predeceased her. My view has been, on the authority of the principle given effect to in *Webster v. Shiress* (25th October 1878, 6 R. 102), that a very substantial beneficial interest in the estate of a deceased person by one not the next of kin, entitled such person to be conjoined as executor along with the next of kin; and giving effect to this view, I would have been inclined to have conjoined the husband and next of kin in this executory. Sheriff Berry, however, takes a different view. He has held, in the case of *Stewart* (1886), that in a competition between the father of a deceased person and a widow, the father, as next of kin, must succeed to the office, to the exclusion of the widow. The husband in this case appears to me to be in *pari casu* to the wife in the case just referred to, and in these circumstances I must just give effect to Sheriff Berry's views."

The husband appealed to the Second Division of the Court of Session, and argued—The passing of the Married Women's Property Act 1881 had materially altered the position of a husband. He had now a substantial beneficial interest in his wife's moveable estate upon her death. If that altered position did not give him the right to exclude the next of kin he ought at least to be conjoined with them. It was always competent to the Court to make a joint appointment. In the case of *Muir*, 3rd November 1876, 4 R. 74, the Court remitted the case back to the Sheriff that the mother might be conjoined with the widow, and in the case of *Webster v. Shiress*, 25th October 1878, 6 R. 102, the representative of the father was conjoined with a brother of the deceased.

Argued for the respondent—The order of preference for the office of executor-dative was well established—Bell's Prin. sec. 1894. The next of kin were preferred to the exclusion of the widow, and the 1881 Act only put a widower in the same position as regards rights of succession as a widow. To reverse the judgment here would lead to ordinary creditors constantly petitioning to be conjoined with the next of kin.

At advising—

LORD RUTHERFURD CLARK—The question is whether the husband of the deceased Mrs Stewart is entitled to be conjoined as executor along with her next of kin. The husband maintains that he is, in respect that under the Act of 1881 he takes by operation of law in his wife's estate the same share and interest which is taken by a widow in her deceased husband's moveable estate." In other words, he takes

*jure relicti* the same interest in his wife's estate as a widow *jure relicte* takes in the goods in communion.

The order of executors has long been settled. The universal legatee is preferred to the office; 2, the next of kin; 3, the widow; 4, a creditor; 5, a legatee; 6, the procurator-fiscal of court. It will be observed that all persons who have an interest in the estate are not conjoined in the office, and that the next of kin are preferred to the widow.

By force of the statutes of 1877 and 1881 the moveable estate of a married woman does not pass under the *jus mariti*, but remains her separate property. If she dies intestate her next of kin are entitled to be preferred to the office of executor. The question is whether the husband, by virtue of the interest which he takes in his wife's estate, is to be considered as one of the next of kin? He is certainly not within the class at common law, nor does the statute so declare. His interest in his wife's estate is the same as the interest of a widow in the goods in communion. But having that interest, the widow is postponed to the next of kin in a competition for the office of executor. By parity of reasoning the husband, whose interest is identical, can have no higher right, and he is in my opinion not entitled to be conjoined in the office of executor with the next of kin.

The interlocutor of the Sheriff-Substitute will be affirmed.

The LORD JUSTICE-CLERK, LORD YOUNG, and LORD LEE concurred.

The Court affirmed the judgment of the Sheriff-Substitute.

Counsel for the Appellant—G. W. Burnet. Agents—Carmichael & Miller, W.S.

Counsel for the Respondent—Guthrie. Agents—Morton, Smart, & Macdonald, W.S.

Wednesday, March 19.

## FIRST DIVISION.

[Lord Kincairney, Ordinary.]

### LIVINGSTONE v. BEATTIE.

*Process—Removing Crofter—Suspension—Caution—A.S., Dec. 14, 1756.*

A tenant against whom decree of removing had been pronounced by the Sheriff, and who had been charged on said decree to remove, brought a suspension of the decree and charge on the ground that the decree was erroneous in respect that he was a crofter, and could only be removed for some of the reasons specified in the Crofters Holdings Act. The Court *passed* the note on jutory caution.

In April 1889 Miss Beattie of Glenmorven brought an action of removing against Robert Livingstone, a tenant on her estate, in the Sheriff Court of Argyllshire, to have

him ordained to flit and remove from the houses and land and right of pasturage occupied by him at the term of Whitsunday 1889 under pain of ejection. Defences were lodged for Livingstone, and a record was made up in the action, upon considering which the Sheriff-Substitute on 1st June 1889 found that Livingstone was a crofter within the meaning of the Crofters Holdings (Scotland) Act 1886, and could not be removed from his holding except in consequence of a breach of one or more of the conditions enumerated in that Act, and therefore dismissed the action. Miss Beattie appealed against this judgment to the Court of Session, and the First Division of the Court in July 1889 allowed the parties a proof of their averments in common form, and remitted to the Sheriff to take the proof and proceed in the action accordingly. Evidence was thereafter led by the parties respectively, and the Sheriff-Substitute thereafter on 8th August 1889 pronounced decree of removing against Livingstone, which judgment was on appeal affirmed by the Sheriff-Principal on 19th October 1889.

The question before the Sheriff turned very much on whether or not Livingstone was resident on his holding at the passing of the Crofters Holdings Act.

On 27th November Miss Beattie gave Livingstone a charge to remove.

On 6th December Robert Livingstone brought the present note of suspension of the decree and charge.

The complainer averred that he was a crofter within the meaning of the Crofters Holdings Act 1886, and could only be removed in terms of that Act, and that the decree was erroneous in fact and law.

He pleaded—“(1) The decreets sought to be suspended, being unfounded in fact and erroneous in point of law, cannot be the foundation of legal diligence, and the same, together with the charge given thereon, ought to be suspended as craved.”

Miss Beattie lodged answers denying the complainer's averments.

The respondent pleaded—“(3) In any case the note should only be passed on caution being found for violent profits, and for payment of the expenses already found due, for which a charge has been given.”

The Lord Ordinary on 30th January 1890 passed the note on jutory caution, and remitted to Mr M'Lachlan, Sheriff-Substitute, Oban, to take the suspender's oath ament jutory caution, and to report.

“*Note.*—This case has already been under the notice of the Court of Session, and their Lordships of the First Division, I understand, sent it back for further inquiry. The decision in the Sheriff-Court has now been against the defender, but it rather appears to me that the case raises certain novel questions in reference to and arising out of the Crofters Holdings Act, and that injustice might be done if the defender were not permitted to submit these questions to the Court of Session.”

From the report of the Commissioners the following facts appeared:—The complainer's estate, as stated in the inventory produced