

aliment must be limited to the pupillarity of the children—*Symington v. Symington*, March 18, 1875, 2 R. (H.L.) 41. (2) But in any case two conditions were essential to aliment becoming a binding obligation on a parent—indigence on the part of the child, and superfluity on the part of the parent—*Reid v. Moir*, July 13, 1866, 4 Macph. 1060, per Lord Justice-Clerk, p. 1063. Here the children were of an age to support themselves, while the father was so far from superfluity that he was unable to maintain himself. (3) Lastly, if aliment were exigible from the father, it must be sued for by the minor children themselves, and not by their mother—*Hardie v. Leith*, October 31, 1875, 6 R. 115.

Argued for the pursuer—The children here were still *de facto* in the custody of the mother; aliment was the correlative of custody; the children were entitled to aliment suitable to their condition in life; therefore the pursuer's motion should be granted. The true meaning of section 9 of the statute was that the Court might do incidentally in an action of divorce what in virtue of its *nobile officium* it had a right to do on a separate application—*Lang v. Lang*, January 30, 1869, 7 Macph. 445. There was not a word in the statute to indicate that an order competently pronounced under section 9 should not continue in force after the children attained minority. In any event, the defender had, since the children attained minority in 1890, acquiesced in the payments made under the judgment of the Court, and was therefore barred from maintaining that aliment should cease. As for his allegation of indigence, it must be kept in mind that in his marriage-contract he had bound himself to "aliment, maintain, and educate" his children in a manner suitable to their station in life.

At advising—

LORD PRESIDENT—In my opinion, the Lord Ordinary who pronounced the interlocutor of 17th March 1890 had no power to assign to the pursuer the custody of these children after they had ceased to be pupils. His Lordship's jurisdiction necessarily rested on the Conjugal Rights Act 1861; for, apart from that statute, questions of custody are not competent to a Judge in the Outer House. Now, the 9th section of the statute applies only to pupils. Seeing, then, that the interlocutor is an exercise of the statutory jurisdiction, it is to be read—and, I think, may fairly be read—as relating solely to the period of pupillarity. The custody having ceased, the aliment had also ceased. Were the true meaning of the interlocutor wider, to that extent it would be *ultra vires* and ineffectual. This being so, the interlocutor ceased to be operative as regards each child when he passed pupillarity.

In this view the present process has ceased to be one in which any order of custody or aliment can competently be pronounced. On this ground I consider that the defender's motion should have been refused absolutely, and not *in hoc statu* merely.

The rights *inter se* of the defender on the one hand and his sons on the other, if these

come in dispute, must be determined in some other process, and may arise in relation to the disposal of the money remaining in the hands of the trustees. There may also arise any equitable claims which the wife may have, arising out of the conduct of the husband in allowing her while *de facto* providing for the children, to enter into onerous engagements for their benefit. None of such questions are now competently before us.

I am for varying the Lord Ordinary's interlocutor of 7th October 1895 by omitting the words *in hoc statu*, and *quoad ultra* adhering.

LORD ADAM—I am of the same opinion. The Lord Ordinary had no jurisdiction to regulate the maintenance, custody, and education of children before the Conjugal Rights Amendment Act of 1861. But section 9 of that Act empowers the Lord Ordinary to make such provision as to "him shall seem just and proper with respect to the custody, maintenance, and education of any pupil children of the marriage," &c. It appears that the jurisdiction of the Lord Ordinary does not go beyond the power to regulate the custody, maintenance, and education of pupil children, and that he has none to regulate those of minors. That being so, the question is, What is the meaning of the Lord Ordinary's judgment? I agree with your Lordship that there is no doubt that it must be read with reference to the jurisdiction which he possesses. If that be so, the meaning is, that the children referred to in the decree are pupil children, and that the virtue of the interlocutor ceases as soon as the children attain minority. I therefore agree.

LORD KINNEAR concurred.

LORD M'LAREN was absent.

The Court varied the interlocutor of the Lord Ordinary by omitting the words "*in hoc statu*;" *quoad ultra* adhered.

Counsel for Pursuer and Respondent—Guthrie—W. C. Smith. Agents—Pringle & Clay, W.S.

Counsel for Defender and Reclaimer, W. Campbell—Craig. Agent—James Allan, Solicitor.

Friday, November 29.

FIRST DIVISION.

MUNRO AND OTHERS (M'KIMMIE'S TRUSTEES) v. COMMISSIONERS OF INLAND REVENUE.

Revenue — Stamp — Discharge of Bond — Partial Discharge—Stamp Act 1891 (54 and 55 Vict. cap. 39), Sched. 1.

By the first schedule of the Stamp Act 1891, sub-sec. 5, under the heading "mortgage, bond, debenture, covenant," *ad valorem* duty is charged upon

the "reconveyance, release, discharge, surrender, re-surrender, warrant to vacate, or renunciation of any such security as aforesaid, or of the benefit thereof, or of the money thereby secured."

Held (1) that the above sub-section applies only to such discharges as have the effect of wholly freeing the subjects of the security from that security; (2) that in the case of securities which have been already partially discharged, duty is exigible at the final discharge on the full amount at any time covered by the security; and (3) that partial discharges of a security are liable only to an ordinary deed stamp of 10s.

By the first schedule of the Stamp Act 1891 (54 and 55 Vict. cap. 39) there are charged the following stamp duties:—"Mortgage, bond, debenture, covenant (except a marketable security otherwise specially charged with duty), and warrant of attorney to confess and enter up judgment—(1) Being the only or principal or primary security (other than an equitable mortgage) for the payment or repayment of money. Exceeding £300. For every £100, and also for any fractional part of £100 of the amount secured—2s. 6d. (2) Being a collateral or auxiliary or additional or substituted security (other than an equitable mortgage), or by way of further assurance for the above-mentioned purpose, where the principal or primary security is duly stamped: For every £100, and also for any fractional part of £100 of the amount secured—6d. (3) Being an equitable mortgage:—For every £100, and any fractional part of £100 of the amount secured—1s. (4) Transfer, assignment, disposition, or assignation of any mortgage, bond, debenture, or covenant (except a marketable security), or of any money or stock secured by any such instrument, or by any warrant of attorney to enter up judgment, or by any judgment:—For every £100, and also for any fractional part of £100, of the amount transferred, assigned, or disposed, exclusive of interest which is not in arrear—6d. And also where any further money is added to the money already secured—the same duty as a principal security for such further money. (5) Reconveyance, release, discharge, surrender, re-surrender, warrant to vacate, or renunciation of any such security as aforesaid, or of the benefit thereof, or of the money thereby secured: For every £100, and also for any fractional part of £100, of the total amount or value of the money at any time secured—6d."

By bond and disposition in security in common form, dated 5th and recorded 7th June 1877, Robert Cruickshank, sometime residing in Glasgow, then of the English Baking Company, South Portland Street, Glasgow, and residing in Lenzie, granted him to have borrowed and received the sum of £5000 from John Blackwood Greenshields and others, the surviving trustees and executors of John Greenshields, sometime of Kerse, in the parish of Lesmahagow, and bound himself and his representa-

tives to repay the said sum to the lenders. In security of his personal obligations he disposed in security to the lenders the heritable subjects described in the discharge hereinafter quoted. The said bond and disposition was impressed with a stamp of £6, 5s., being at the rate of 2s. 6d. per £100 of said sum of £5000. The said Robert Cruickshank afterwards sold said heritable subjects to William M'Kimmie, flesher, Glasgow, now deceased, under burden of the said bond and disposition in security. In May 1887 the said William M'Kimmie repaid to the surviving trustees and executors of the said John Greenshields the sum of £2000 to account of said loan of £5000, and he received from them a partial discharge dated 5th, 7th, and 9th, and recorded 18th, all days of May 1887, whereby, in consideration of the said sum of £2000 then paid to them, they discharged the said bond and disposition in security for £5000 to the extent of the principal sum of £2000, interest due thereon, and penalties corresponding thereto, and declared the security-subjects to be redeemed and disburdened to the extent foresaid. The said partial discharge was impressed with a stamp of 10s. In May 1895 the trustees of the said William M'Kimmie repaid the surviving trustees and executors of the said John Greenshields the balance of £3000 secured by the said bond and disposition in security; and a question arose regarding the amount of stamp-duty chargeable on the discharge for £3000.

The following are the terms of the instrument so far as relevant to the question at issue:—"We, . . . the surviving trustees and executors of the deceased John Greenshields, . . . in consideration of the sum of £3000 sterling, now paid to us as trustee foresaid by . . . the trustees of the now deceased William M'Kimmie, . . . being the balance remaining undischarged of the principal sum contained in the bond and disposition in security after mentioned, do hereby discharge (but only to the extent of the said sum of £3000 paid as aforesaid) a bond and disposition in security . . . for the sum of £5000 sterling granted by . . . the then trustees of the said deceased John Greenshields, and all interest due thereon; and we, as trustees foresaid, declare to be redeemed and disburdened thereof, and of the infetment following thereon, but only to the extent foresaid, All and whole that area of building ground . . . specified in the said bond and disposition in security."

On 8th June 1895 the trustees presented this instrument to the Commissioners of Inland Revenue, and desired to have their opinion as to the stamp-duty with which it was chargeable. The Commissioners were of opinion that the instrument was chargeable with the *ad valorem* duty applicable to the discharge of a mortgage for the full sum of £5000, being "the total amount or value of the money at any time secured thereby," viz., £1, 5s. They accordingly assessed the duty at £1, 5s. on the instrument, whereupon the trustees paid this amount, and had the instrument duly stamped, but

being dissatisfied with the determination of the Commissioners, called upon them to state a case for the opinion of the Court.

The appellants maintained that the bond having been discharged to the extent of £2000 in 1887, and discharge duty at the rate of 6d. per £100 having then been paid on that sum, duty was now chargeable only on the balance of £3000, which was the whole extent to which the bond was discharged and required to be discharged by this instrument. They submitted accordingly that it was liable to be charged with 15s. only of *ad valorem* duty, and not £1, 5s.

The question submitted for the opinion of the Court was—"Whether the said instrument, in the circumstances above set forth, is liable to be assessed and charged with *ad valorem* duty of £1, 5s., or whether it is chargeable with *ad valorem* duty of 15s. only?"

Argued for appellants—By the terms of the discharge it was only a partial one, to the extent of £3000, and not general, and it was accordingly liable to duty only on that amount. In creating a bond, an addition might be made to the money already secured, and by the fourth sub-section of the schedule, duty must be paid only on that addition, and, conversely, the fifth sub-section should apply only to the amount actually discharged. The principle of the Stamp Act was not to make a sliding scale, but a uniform duty applicable to the amount actually dealt with. It would be a very dangerous doctrine for the Crown to maintain that partial discharges were not liable to this duty.

Argued for respondents—There was no reference in the schedule to a partial discharge, and the fifth sub-section applied only to a total discharge, as the words used, "total amount," showed. The partial discharge had only been liable to a deed stamp of 10s., as falling under the denomination of "any deed whatsoever not described in this schedule." Thus, where there was a transaction involving several deeds, the *ad valorem* duty stamp would be exacted on the principal one, and the 10s. stamp on each of the others.

At advising—

LORD PRESIDENT—In my opinion, the instrument in question is liable to be assessed and charged with *ad valorem* duty of one pound five shillings.

I think the Commissioners rightly read the fifth sub-section, *voce* mortgage, in the schedule as applying, and applying only, to such discharges as have the effect of wholly freeing the subjects of the security from that security, and that the duty is to be calculated by the maximum of the burden which was ever incumbent by virtue of the security. It results, first, that the duty is payable equally on a discharge of the balance of the money with a discharge of the whole money; and, second, that this section does not apply to a discharge which lifts off from the security subjects only part of the security, but leaves it in part still incumbent.

As this view has the effect of ousting from this section discharges which do not have the effect by themselves, or in combination with previous discharges, of finally removing the burden, it follows that such discharges are liable to an ordinary deed stamp, for they certainly are deeds, and they are not, in the words of the Act, "described in this schedule."

What course the Department deem it proper to take in exacting the several duties which the statutes authorise, is a matter of administration with which courts of law have not to do.

LORD ADAM, LORD M'LAREN, and LORD KINNEAR concurred.

The Court pronounced the following interlocutor:—

"Find and determine that the instrument in question set forth in the case is, in the circumstances set forth, liable to be assessed and charged with *ad valorem* duty of one pound five shillings sterling, and decern: Find the Commissioners of Inland Revenue entitled to expenses, and remit," &c.

Counsel for the Appellants—M'Lennan—Younger. Agents—Cumming & Duff, S.S.C.

Counsel for the Respondent—Lord Advocate (Sir C. Pearson)—A. J. Young. Agent—Solicitor of Inland Revenue.

Friday, November 29.

FIRST DIVISION.

[Lord Kyllachy, Ordinary.]

SHEDDEN v. WILSON AND OTHERS.

Trust—Antenuptial Trust—Jus quæsitum tertio—Revocability—Option of Trustees to Repay to Truster.

A truster, in contemplation of her approaching marriage, assigned to trustees her whole estate, heritable and moveable, to be held by them, "First, for my life-erent use and enjoyment allenerly during all the days and years of my life. . . . Second, for behoof of my sisters . . . equally between them and their respective heirs in fee; and Third, notwithstanding the provision of life-erent and fee hereinbefore contained, it shall be within the power of my said trustees at any time, in their discretion solely, and to the exclusion of every other manner of judging, to advance and pay to me in life either the whole or such part of the capital as they may think fit, and that without any consent or concurrence of any kind whatever." It was further provided that the trust-estate was not to be affected by the debts or deeds of the truster.

The deed was delivered to the trustees.

Held that the deed operated a complete divestiture of the truster's estate, and was irrevocable.