

for which the supply was granted. Under such an action no decree could be obtained to any effect except the regulation of possession. The decree would not bar the proprietor from maintaining his construction of the agreement, and the consequent rights upon it, which he asserted by an action in the Supreme Court. In sustaining the jurisdiction we affirmed nothing more than the well-settled principle that the judge-ordinary has jurisdiction to maintain the existing state of possession as to heritable property and things locally situated within the county. The learned Sheriff has quite accurately stated the import of the decision, and nearly in the words which I have used. That this was the true ground of decision is evident from the concluding paragraph of the opinion of Lord President Robertson, who says:—"To restore against unlawful changes in such subjects is a judicial duty which can effectively and conveniently be done by the local court of the territory alone, as is most clearly seen perhaps in the case of the judge being asked to appoint the work of restoration to be done at the sight of the Court." Lord Adam observed—"There is no doubt that the pipes which are the subject-matter of this action lie within the bounds of the Sheriff's jurisdiction, and the question raised is a merely possessory one, whether the pursuers are to be protected in the possession of these pipes." The only other Judge present was myself, and as my opinion was merely a concurrence in that of the Lord President, I wish to take this opportunity of saying that if his Lordship is correctly reported, I would wish to qualify my own opinion by omitting the word "alone" in the sentence which I have quoted. I think that the arm of the Supreme Court is strong enough to maintain all owners of property in Scotland in the possession of their rights, and I do not think that the Lord President meant to say anything to the contrary, but only to affirm that in such a case as that with which he was dealing the Sheriff Court is the more convenient Court for the settlement of questions of disputed possession.

Now, I think that to argue from the judgment in *Smith-Sligo's* case that the Sheriff has universal jurisdiction *ratione rei sitae*, is an example of unsound induction from an isolated case. In our judgment we did not consider any case except that of disputed possession; and the authority of the case of *M'Bey v. Knight* is in no way affected by anything that was said in *Smith-Sligo's* case by the judges of this Division of the Court.

I wish to guard myself against being supposed to touch the question of the effect of a statutory warrant of distress or other legal process directed against a plurality of defaulting ratepayers.

It may be that where the name of a non-resident owner is lawfully included in such a list the statute is a warrant for diligence against his estate within the county. In the present case the local authority has elected to proceed by way of action against the owner-ratepayer, and our decision only

applies to the jurisdiction of the Sheriff under an ordinary action in his Court.

I think we should return to the judgment of the Sheriff-Substitute of 4th July 1898; sustain the appeal, and dismiss the action.

LORD ADAM and LORD KINNEAR concurred.

The Court pronounced the following interlocutor—

"Sustain the appeal: Find in terms of the findings in fact and in law in the interlocutor of the Sheriff-Substitute, dated 4th July 1898: Affirm the said interlocutor: Recal the interlocutor of the Sheriff, dated 9th September 1898: Of new dismiss the petition so far as it is directed against the defender Mary Gardner or M'Lean, and decern: Find said defender entitled to expenses to 4th July 1898, and to additional expenses from said date, and remit the accounts of said expenses to the Auditor to tax and to report: Also dismiss the action against the defender Robert Millar."

Counsel for Pursuers—Guthrie, Q.C.—Guy. Agent—F. J. Martin, W.S.

Counsel for Defender—Findlay. Agents—Gill & Pringle, W.S.

Friday, November 17.

FIRST DIVISION.

DUNCAN v. MOIR.

Proving the Tenor—No Written Adminicles—Parole Evidence—Wilful Destruction.

Parole evidence on which, in the absence of written adminicles, the Court held the tenor of an informal holograph testamentary writing to be proved, the *casus amissionis* having been the wilful destruction of the document by a daughter of the maker of the will, who took no benefit thereunder.

An action of proving the tenor was raised by Mr William Oswald Duncan, *curator bonis* to Charlotte Jane Calder, an inmate of the Royal Lunatic Asylum, Aberdeen, against Mrs Moir and others, being the next-of-kin and representatives of next-of-kin of the late Mrs Isabella Low or Calder. The summons concluded to have it found and declared "that the last will and testament of the deceased Mrs Isabella Low or Calder, widow of the late Charles Calder, merchant in Aberdeen, was an authentic document subscribed by the said Mrs Isabella Low or Calder, and of the tenor following:—"I wish, when die, I that my daughter Charlotte Calder get everything belonging to me, with power to her to divide between her sisters Agnes and Janet as she pleases, and I appoint her to be my executrix.—ISABELLA LOW CALDER;" or of such tenor and effect as may be found by our said Lords in the course of the process to follow hereon; and it ought further to

be found and declared, by decree foresaid, that the said last will and testament was holograph of the said Mrs Isabella Low or Calder; as also, it ought and should be found and declared, by decree of our said Lords, that the decree to be pronounced herein shall be in all respects as valid and effectual a document to the pursuer in all cases, improbation as well as others, as the original deed, if extant, would be, notwithstanding the same has been lost."

The pursuer averred—" (Cond. 1) Mrs Isabella Low or Calder, widow of the late Charles Calder, merchant in Aberdeen, died on the 20th day of January 1898 in the Nazareth House, a Roman Catholic convent in Aberdeen, leaving a holograph last will and testament executed by her in the terms specified in the summons. This last will and testament was, along with various other papers belonging to her, delivered by the convent authorities on or about 24th January 1898 to the late Mr George Low Calder, a son of the deceased, who on the following day sent them to the defender Mrs Agnes Low Calder or Moir, along with a letter in the following terms:—'25th January 1898—192 Great Western Road.—To Mrs Moir,—I have looked through mother's papers, which I received from the convent yesterday afternoon. I find she has left everything to Charlotte, with power to divide between you and Mrs Williamson as she pleases. If the authorities find out they will take everything, and I am perfectly helpless. I am shut out from acting. There is a little money in the bank, and there is something due by the Insurance Company. But they will not recognise me, so you and Janet must do your best to get possession, and you can do as you like with it as far as I am concerned.—Yours,
'GEO. LOW CALDER.'

"There is also something in the Co-operative Co., but I cannot make it out.

"I send the bag with all the papers per bearer."

The pursuer further averred that the whole means belonging to Mrs Calder at the time of her death, in addition to her personal effects, consisted of a balance of £5, 0s. 5d. in the Aberdeen Savings bank; that "(Cond. 3) Shortly after said 25th January 1898 the defender Mrs Moir and the defender Mrs Williamson attended at the said Aberdeen Savings Bank, and exhibited to Mr Jaffray, the accountant there, the said last will and testament for the purpose of obtaining payment of the said balance of £5, 0s. 5d., and this balance was, on 27th January 1898, paid to them on their receipt. The said Charlotte Jane Calder was at that date an inmate of the Royal Lunatic Asylum, Aberdeen, and incapable of acting on her own behalf."

The pursuer further averred that after he had been appointed *curator bonis* to Miss Charlotte Calder he had called on Mrs Moir to hand him over Mrs Calder's will, and that "Mrs Moir admits that the said last will and testament once existed and was in her possession, but declares that it has been destroyed. The pursuer avers that the said last will and testament was

destroyed by the said Mrs Moir or the said Mrs Williamson, or by both of them, but he is unable to specify more particularly the *casus amissionis* of the said last will and testament owing to the refusal of the said Mrs Moir and Mrs Williamson to give precise details as to its destruction."

The pursuer pleaded—"The said last will and testament of the said Mrs Isabella Low or Calder having been destroyed, the pursuer is entitled to have the tenor thereof proved as concluded for."

No appearance was entered for the defenders.

On 4th July 1899 the Lord Ordinary (KINCAIRNEY) made *avizandum* with the cause to the First Division.

On 6th July the Court allowed the pursuer a proof before answer as to the tenor of the writ and the *casus amissionis*.

Mrs Herd, the housekeeper of Mr George Low Calder, deponed—"I saw Mr Calder open the bag and take out the papers in it. He showed me a paper which he said was his mother's will. He handed me this paper, and said that 'that was my mother's will.' I took the paper and read it. It was a long narrow strip of paper, something like the shape of a newspaper wrapper, and of a bluish colour. My recollection is very distinct that the terms of the will were to the effect—'I wish, when I die, that my daughter Charlotte Jane Calder have everything belonging to me.' It is also said that she wished her other two daughters, who were mentioned by name—Agnes and Janet—to manage for Charlotte; Agnes is Mrs Moir and Janet is Mrs Williamson; but I cannot remember whether or not they were described by their full names; I remember that the will was signed 'Isabella Low Calder,' and the will and the signature were in the handwriting of Mrs Calder."

Mrs Moir deponed—"My mother was living with me for a period of about six months. That would be from about eighteen months to a year before her death. While my mother was so living with me I remember her writing upon a piece of paper, and when she had finished writing on this paper I went to put the paper and her writing materials away. I saw that the paper left everything to my sister Charlotte. My memory is quite distinct that the words were—'I leave all my money and Cop to my daughter Charlotte.' By this she meant, so far as the word 'Cop' is concerned, shares in the Northern Co-operative Company, Aberdeen. I think it went on to say that Charlotte might give anything she chose to me or Mrs Williamson."

Mrs Moir further deponed that when her mother was dying she saw this paper among her papers, and that she afterwards received it from her brother, George Low Calder, along with the letter from him quoted above, that she handed the paper to her sister Mrs Williamson, and had not seen it since.

Mrs Williamson deponed—"After my mother's death I remember Mrs Moir bringing to my house a bag containing papers belonging to my mother. Mrs Moir

opened the bag and took out some papers. I recollect my sister showing me a letter which she had received from my brother George along with the bag of papers. As far as I recollect, George said in the letter that I was to have half of my mother's estate, which was to be divided between me and Mrs Moir. [Shown No. 1]—I cannot read the letter as I am too shortsighted, but I recollect parts of it. No. 1 being read to me, I depone that I think that must be the letter; that was my recollection of what was in it. I remember that when the bag was opened my sister said something about my mother's will, and about the 'Cop.' She did so with reference to one of the papers taken from that bag. I took sufficient notice of the piece of paper to be able to identify it when I saw it again. It was a longish piece of paper. Mrs Moir left the papers with me, including this paper. . . . When my sister left the papers, including the will, in my house after mother's death, I took them up off the table where she left them and put them into a drawer. About a month or six weeks afterwards I was preparing my house for lodgers, and I emptied the drawer in which I had put the papers. Among the papers in this drawer I recognised the paper which my sister had showed me when she spoke of my mother's will, and I saw that it was signed by my mother, but I did not look at it particularly. I crumpled it up along with the other papers and took it away and burned it."

Mr Jaffrey, actuary, Aberdeen Savings Bank, depone that Mrs Moir and Mrs Williamson came to the bank to draw out their mother's money, and showed to him her will; that "The document was of an informal nature, and was not folded after the ordinary legal fashion. My impression is that it was a holograph will signed by Mrs Calder, and that its terms coincided with the statement of George Low Calder in the second paragraph of letter No. 1—that is to say, that it left everything to Charlotte Calder. I am satisfied that it bore out everything in the said letter."

There was, however, a conflict of evidence on this point, Mrs Moir denying that the will had ever been shown to Mr Jaffrey, while Mrs Williamson stated that she had no recollection of it.

Argued for the pursuer—Admittedly there were no adminicles, and as a rule adminicles were considered necessary, but in cases such as this where the will was informal and it was unlikely that a draft existed, and further, where the *casus amissionis* was the wilful destruction of the document by an interested party, the Court had held that the terms of the deed might be sufficiently instructed by parole evidence—*Leckie v. Leckie*, July 12, 1884, 11 R. 1088; *Lillies v. Lillie*, December 4, 1832, 11 S. 160; *Sugden v. Lord St Leonards*, March 13 [1876], L.R. 1 Prob. Div. 154. In the case of *Rannie v. Ogg*, June 12, 1891, 18 R. 903, opinions were expressed apparently adverse to the pursuer's view, but that was the case of a deed granted by the defender, and destroyed by him unde-

livered. Moreover, the case of *Leckie v. Leckie*, *supra*, was not cited to the Court. The pursuer had proved the essential part of the will, viz., that everything had been left to Charlotte, and it was unnecessary for him to prove all the words.

The Court instructed the pursuer to amend his summons by deleting the words "and I appoint her to be my executrix," and thereafter pronounced the following interlocutor:—

"Open up the record: Allow the summons to be amended by deleting the words 'and I appoint her to be my executrix,' occurring on the 8th and 9th lines of page 4 thereof; and the same having been done of new close the record, and find and declare in terms of the conclusion of the summons as amended, and decern."

Counsel for Petitioner—Dove Wilson.
Agent—Arthur H. Paterson, W.S.

Friday, November 17.

FIRST DIVISION.

[Sheriff Court of Lanarkshire.

SHEARER v. MILLER & SONS.

Reparation — Workmen's Compensation Act 1897 (60 and 61 Vict. cap. 37), sec. 2
(1) — *Notice of Accident — Prejudice to Employer — Onus of Proof.*

In a case stated under the Workmen's Compensation Act 1897 it appeared that the workman had not given notice of his claim till seventeen days after he had met with the accident, and that he left his employment on the day on which it occurred. The Sheriff found "that it was not proved (a) that the want of or delay in giving notice was occasioned by mistake or other reasonable cause; and (b) that the respondents had not been prejudiced in their defence by reason of the want of or delay in giving notice."

Held that the onus of proving that the employer had not been prejudiced lay in the first instance upon the workman, that it did not appear from the Sheriff's findings that this onus had been discharged, and that accordingly the workman's claim to compensation was barred.

Observations as to the evidence required to discharge this onus.

This was a stated case under the Workmen's Compensation Act 1897, in which the appellant John Shearer claimed damages in respect of injuries sustained by him while in the employment of the respondents George Miller & Sons, coal-masters, Glasgow. The following was the case as stated by the Sheriff-Substitute (GUTHRIE):—"This is an arbitration under The Workmen's Compensation Act 1897, brought before the Sheriff of Lanarkshire at Glasgow, at the instance of the appellant