

Agent for Suspenders—Andrew Fleming, S.S.C.  
Agents for Commissioners of Police—M'Ewen &  
Carmont, W.S.

Thursday, Feb. 21.

## SECOND DIVISION.

M.P.—MONTEATH DOUGLAS' TRUSTEES v.  
DOUGLAS AND OTHERS.

*Process—Multiplepointing—Executor—Res Judicata.* A claimant in a multiplepointing was *in foro* ranked and preferred in terms of her claim; but did not for some years enforce the decree. After her death her executor was sisted and moved for decree of new in his favour. This was opposed by another claimant in respect of an alleged change of circumstances. *Held*, that the final decree in favour of the claimant could not be gone back upon and decree pronounced of new.

In this multiplepointing, the Lord Ordinary in 1862 sustained the claim of Miss Margaretta Monteath, one of the claimants, "no objections thereto being stated," and decerned and granted warrant to, authorised and ordained the trustees, the raisers, to make payment thereof to her. This decree was pronounced *in foro*, and became final, but was not enforced during Miss Monteath's life. She died in 1865, leaving a will whereby Mr John Spark was nominated her sole executor.

Mr Spark, having made up his title, moved the Lord Ordinary to sist him as a party to the process, and to pronounce decree of new in his favour as executor of Miss Monteath. The motion for decree was opposed by Mr Donald Lindsay, judicial factor on the trust estate of Mr Archibald Douglas Monteath, on the ground that since 1862 it had become doubtful whether the fund *in medio* would be sufficient to pay all the claims upon it.

The Lord Ordinary (Jerviswoode) sisted Mr Spark, but refused the motion *quoad ultra*.

Mr Spark reclaimed.

The Court unanimously recalled the interlocutor of the Lord Ordinary, and pronounced decree of new in favour of Mr Spark as executor of Miss Monteath. They could not go back on the interlocutor of 1862, which was not only a decree of preference, but also for payment, and pronounced *in foro*. It was *res judicata*. When the parties to the action allowed that decree to be pronounced and to become final they took their chance of the consequences. If it should now turn out that they have undertaken too great a risk the result might be unfortunate but it was unavoidable.

Counsel for Reclaimer—Mr Burnet. Agents—Lindsay & Paterson, W.S.

Counsel for Respondent—Mr Adam. Agents—Lindsay, Howe, & Co., W.S.

## ANDERSONS v. ROBERTSONS TRUSTEES AND MURDOCH.

*Deed—Delivery.* A disposition of heritage held ineffectual in respect it had not been delivered by the grantor, but retained by him in his own custody.

This is an action to have it declared that a deed executed by the late Andrew Robertson, sometime residing in Pitt Street, Portobello, in 1856, by which he conveyed certain house property there in favour of his illegitimate daughter, the pursuer, in liferent, and her children in fee, was a valid conveyance. The deed had not been delivered, and

was found at Robertson's death in his repositories. He also left a testamentary writing, leaving his property to trustees, which contains *inter alia* a declaration holograph of him in the following terms:—"1856. Elisabeth Robertson or Anderson has got No. 5th house in James Street, in Portobello, with charter;" which the pursuer says refers to the conveyance of 1856 in favour of herself and children. The pursuer maintains that Robertson the grantor of the deed held it for her behoof and that of her children, and she makes the following averments:—

"On or about 4th March 1854, the said Andrew Robertson executed a *mortis causa* disposition, whereby he conveyed the piece of ground described in the summons to the pursuer, Mrs Anderson, in liferent, and her children in fee. After the execution of this deed, the said Andrew Robertson resolved to give the pursuers an immediate right to the said subjects, and gave the necessary instructions to his agents, Messrs Mackenzie & Baillie, Writers to the Signet in Edinburgh, for having this done. Accordingly, in terms of these instructions, Messrs Mackenzie & Baillie prepared a disposition of the said subjects in favour of the pursuers, which was executed by the said Andrew Robertson on 16th February 1856.

"The fact that he had executed the said disposition was communicated to the pursuer, Mrs Anderson, and a list of the fixtures in the house was handed to her by the said Andrew Robertson, who, at that time and frequently afterwards, told her that the property belonged to her, and that nobody could deprive her thereof. The disposition was held by the deceased Andrew Robertson from the execution thereof until the time of his death on behalf of the pursuers, Mrs Anderson and her said children, and was acted on, both by him and Mrs Anderson and her family, as giving them right to the said subjects. Mrs Anderson exercised various acts of possession and ownership, and was regarded and recognised after the execution of the said disposition as proprietor of the said subjects, and the same were dealt with as her property, as after mentioned.

She then goes to say that from the term of entry specified in the disposition the subjects were let by the deceased in the pursuer's name, and that her name was entered in the books of the superior as proprietor, and that after 1859 her name was entered in the books of the assessor of the burgh as proprietor at the request of Robertson, who also insured the premises against fire in her name.

The Lord Ordinary (Jerviswoode) allowed a proof, and afterwards gave effect to a plea maintained for the defenders the heir-at-law and trustees of the deceased, to the effect that the deed was invalid by reason of its non-delivery.

The pursuers reclaimed.

PATTISON and STRACHAN for them.

GIFFORD and SCOTT in answer.

At advising,

The LORD JUSTICE-CLERK said that the grantee in the present disposition was not in pupillarity or minority. She was a married woman, and the proper custodian of all deeds for her was her husband. The averment of the pursuers was that Robertson, the grantor of this deed, deliberately changed his mind, and, instead of a *mortis causa* deed conveying the property to Mrs Anderson, he executed a deed to have the effect of giving her an immediate interest in the property, with entry at Whitsunday 1856. Admittedly this deed was never delivered, but remained in the custody of the grantor until his death. It had no clause dis-

pening with delivery, no clause giving any other effect to the deed than was usual in a deed of conveyance *inter vivos*, and the deed remaining in his hands, there was no authority for holding that any mode of dealing with the property could have the effect of converting this undelivered deed into a delivered deed. Deeds might, in some cases, receive effect without delivery—(1) where they did not require delivery, and (2) where remaining in the hands of the grantor, or his custodian for him, they were held to be in such custody for behoof of the grantee. Where the grantor may retain the deed, the authorities go this length, that where he is the natural custodian for the grantee the deed may be held to receive effect, as deeds held by the head of a family for his wife and minor children. But the present was not a case of that sort, and facts and circumstances were quite insufficient to enable the pursuers to found on this as a delivered deed.

The other Judges concurred, and the Lord Ordinary's interlocutor was therefore adhered to.

Agent for Pursuers—James Paris, S.S.C.

Agents for Defenders—Watt & Marwick, S.S.C., and Alex. Gifford, S.S.C.

Thursday, Feb. 21.

## SECOND DIVISION.

CAMERON *v.* ROBERTSON AND OTHERS.

*Landlord and Tenant—Removing—Title to Sue.* A warrant of ejection granted by a Sheriff reduced in respect the petitioners for it had no title to sue, not being either proprietors or lessees of the subjects. Question whether tenants under an alleged verbal lease can pursue a removing.

This was an action of reduction and damages brought by the occupant of a croft on the farms of Corpach and Banavie, which form part of the estate of Lochiel. Reduction was sought of a summary warrant of ejection pronounced by the Sheriff-Substitute of Argyllshire, and damages were also claimed, the decree of ejection having been put in force. The defenders, at whose instance the decree of ejection was obtained, set forth that they are a committee of crofters on Corpach and Banavie. According to their statement, each crofter has his own separate portion of arable land, while the hill part of the farms is grazed by their young cattle in common. These possessions are held from year to year. The pursuer has possessed a croft since 1847, free of rent, in consideration of acting as cowherd for the crofters, for which he also received a shilling a year from each crofter who had cattle on the hill. He was engaged by the committee of crofters. The crofters' committee, in spring 1865, resolved to dismiss him, and accordingly one of their number intimated to him on the 3d April that he would not be required as cowherd after Whitsunday, and that he would then require to remove from the croft. On 1st June they presented a petition to the Sheriff for a warrant for his summary ejection, which the Sheriff, in absence, granted.

The Lord Ordinary (Barcaple) reduced the decree complained of, on the ground that the defenders, assuming them to represent the whole crofters, had no title to eject the pursuer. It did not appear, on their own statement, that they were tenants in common of the pursuer's croft,

and in possession of it through him. The arrangement by which a cowherd was to occupy a croft rent free was an accommodation to the other crofters, but was also for the benefit of the landlord, as enabling him to let the other crofts to advantage. When the notice was given, the crofters had clearly no control over the occupation of the pursuer's croft for the following year. It might be that when they took their crofts for that year, by tacit relocation or otherwise, they were entitled to rely upon the landlord continuing to give them the benefit of a cowherd being kept by him in possession of a croft rent free, to give them his services for a small fee. But that would be only a claim against the landlord, and not a right in the special subject entitling them to eject the pursuer.

The defenders reclaimed.

TRAYNER (CLARK with him) was heard for the reclaimers.

WATSON and RHIND, for the pursuer, were not called on.

At advising,

The LORD JUSTICE-CLERK said he had no doubt. It was by no means clear whether, in any circumstances, tenants under a verbal lease could pursue a summary removing. No authority had been produced to show this. But here the defenders were not tenants at all of the pursuer's croft. They had no written lease of it, nor had they possession of it under a verbal lease; and there could be no verbal lease without possession. The only person who could have legally ejected the pursuer was Mr Cameron of Lochiel, the proprietor. The general body of crofters had a perfect right to prevent the pursuer from taking charge of their cattle any longer; but they had none to eject him from his croft.

The other Judges concurred.

The interlocutor of the Lord Ordinary was therefore adhered to.

Agents for Pursuer—D. Crawford and J. Y. Guthrie, S.S.C.

Agent for Defenders—W. Mitchell, S.S.C.

Saturday, Feb. 23.

## FIRST DIVISION.

GORDON *v.* SCOTTISH NORTH-EASTERN RAILWAY.

*Process.* A case having been transmitted to the Inner House by notice of trial, warrant for its retransmission granted, the pursuer being desirous to move the Lord Ordinary to fix a day for trial before himself.

In this case the defenders had given notice of trial for the sittings which had the effect of transferring the case to the Inner House. The pursuer now wished to move the Lord Ordinary to fix a day for trial before himself in the Outer House, but he could not do so as the process was not in the Outer House. He therefore moved the Court to order the transmission of the process to the Outer House.

The defenders objected, but the Court, following the case of Taylor in 1859 (unreported), granted warrant to re-transmit the process to the Outer House.

Counsel for Pursuer—Mr H. J. Moncreiff. Agent—Æneas MacBean, W.S.

Counsel for Defenders—Mr Birnie and Mr Asher. Agents—James Webster, S.S.C., and John Henry, S.S.C.