

There is, no doubt, a discretion in the hands of the Court—which is, however, but charily exercised—to make a party suing find caution for expenses; but I remember hearing the first Lord Mackenzie observe, that while a man's conduct in a cause may induce the Court to order it, absolute impecuniosity alone will not be held a sufficient reason.

I have been induced to make these few observations, as I have been struck by the erroneous impressions which the Courts below seem to have held on the matter.

LORD CRAIGHILL concurred with their Lordships.

The Lords therefore sustained the appeal, recalled the judgment of the Sheriff, and remitted to the Sheriff to proceed.

Counsel for Appellant—Nevay. Agent—Robert Broatch, L.A.

Counsel for Respondent—Shaw. Agent—David Forsyth, S.S.C.

Wednesday, June 1.

## SECOND DIVISION.

SPECIAL CASE—WILL AND OTHERS (LOWDEN'S TRUSTEES) v. LOWDEN AND OTHERS.

*Husband and Wife—Antenuptial Marriage-Contract—Provisions Increased by Subsequent Trust-Deed.*

By an antenuptial contract of marriage it was provided that in case of the predecease of the husband the trustees should pay to his wife £150, which sum she accepted in full of all her legal claims against him or his estate as his widow or otherwise; (2) that the remainder of his whole estate should be divided equally between his children by a former marriage and any child or children to be born by his then contemplated marriage. Four years after, when two children had been born of the marriage, he, with his wife's concurrence, executed a trust-deed and settlement and two codicils thereto, in which, besides increasing the provision already made to her, he gave her the liferent of the shares of his estate falling to her own two children, subject to the burden of alimentering them till they were able to maintain themselves. *Held* that such reasonable provision for his wife was not barred by the terms of his marriage-contract.

Peter Lowden, merchant in Dundee, died on 17th October 1880. He was thrice married, and was survived by his widow Mrs Margaret Wisely Coupar or Lowden; by three children born of his first marriage, viz., Peter Lowden, John Davidson Lowden, and Mrs Mary Ann Lowden or Greig; and by two children born to him of his third marriage, viz., Catherine Kidd Lowden and Rebecca Baxter Smith Lowden. By his second marriage he had no issue.

On 9th March 1870 he entered into and executed an antenuptial contract, whereby in contem-  
plation of his marriage with Miss Margaret Wisely,

who became his widow, he disposed his estates as at his death to certain trustees, in trust for the ends, uses, and purposes thereinafter mentioned, viz., (*First*) Payment of his debts, funeral expenses, &c. (*Second*) That my said trustees shall, as soon as convenient after my death, pay to the said Margaret Wyseley Coupar the sum of £150 in full of all legal claims which she may be entitled to, and of which sum she, by her signature hereto, hereby accepts in full of all her legal claims against me or my said estate as my widow or otherwise. (*Third*) Regarding the remainder of my said estate, I direct my trustees, in the event of there being any children of this marriage, to alimenter and educate them out of the common fund until the youngest arrives at the age of twelve years, and on such age being attained by the youngest, then I direct my said trustees to divide my whole estates equally, share and share alike, between my children got by marriage with Elizabeth Mudie [his first wife], and any child or children who may be born by my present contemplated marriage, giving to my said trustees, as I hereby give discretionary powers to them to mete out or invest the share which may fall to the child or children of this contemplated marriage for their best advantage, and until such time as they may think it prudent to hand over such share to the before-mentioned children. (*Fourth*) My said intended spouse shall be entitled, in the event of her surviving me, to get delivery from my trustees of all the property and articles which she may bring to me at the time of our marriage. . . . And (*Lastly*), and as this contract is also my settlement, I recall all other settlements or contracts I have made."

On 17th July 1874 he executed a trust-disposition and deed of settlement, which was also at the same time subscribed by his wife as approving of the same, in which he disposed his whole means and estate then belonging to him, or which should belong to him at the time of his death, to Adam Will and others, as trustees for the ends, uses, and purposes therein mentioned. In the second purpose he directed his trustees, as soon as convenient after his death, to convey and dispose, absolutely and irredeemably, and at the expense of his trust-estate, to his wife Mrs Margaret Lowden, in the event of her surviving him, and to her assignees whomsoever, a dwelling-house, grounds, and pertinents situated on the east side of Albert Street, Dundee, then occupied by himself. He likewise directed his trustees, as soon as convenient for them after his death, to pay to her the sum of £150 in full satisfaction of the provision of that amount in her favour, as contained in the said antenuptial contract of marriage between him and her; as also, in terms and in satisfaction of the clause or provision to that effect contained in the said contract, to allow her to get delivery of all the property and articles which she brought to him, or with her, at the time of their marriage. And he further directed his trustees, besides and in addition to the provisions now above narrated, to allow to her the free liferent use of the whole household furniture, bed and table linen, and other household effects, including silver plate, and likewise printed books and articles of an ornamental description, that should belong to him at the time of his death, but such liferent was to ter-

minate if she should re-marry. (Fourthly), Mr Lowden directed his trustees, as soon as convenient for them subsequently to his death, and after fulfilment by them of the foresaid purposes, to divide the free residue of his trust-estate into as many equal shares as there should be children of his then alive, whether by his then present marriage or by his former marriage with the said deceased Elizabeth Mudie or Lowden, and to pay or convey one of said equal shares to each of the said John D. Lowden and Peter Lowden, his sons, whom failing to their respective children as therein mentioned, and to hold and retain, subject to the declarations thereafter written, another of the said equal shares for behoof of his daughter Mrs Greig, and to expend for her behoof the free income thereof during her life. He further directed his trustees to hold and retain the shares of said residue destined to the children of his then present marriage with Mrs Margaret Lowden, or to their issue, and to apply the free income thereof for her behoof from the date of his decease during her lifetime or widowhood, but subject to an obligation on her to maintain and educate her said children during the subsistence of her liferent, while they should reside in family with her and be unable to maintain themselves; and also under obligation to relieve his general trust-estate of any obligation undertaken by him in the before-mentioned contract of marriage to aliment the children of her marriage with him; which liferent to her was declared to be purely alimentary, and not assignable, &c. Power was also given to the trustees, with his widow's consent, during her lifetime, to make certain advances to the children of his then present marriage at their respective marriages, or for their advancement in life, to account of their several prospective shares of the trust-estate. After the death or second marriage of their mother these children were entitled to their shares after the youngest should attain majority. (Fifthly), It was further provided, that in the event of all the issue of Mr Lowden's then marriage predeceasing him, but of his being survived by his then wife Mrs Margaret Lowden, his trustees should set aside, at the period for division of the trust-estate, two-fifth parts of the said residue, and hold the same for Mrs Lowden's liferent use during widowhood. The said trust-settlement also contained a general clause of revocation of previous settlements, in the terms following:—"I hereby revoke and recall all previous dispositions and deeds of settlement, or other deeds *mortis causa*, heretofore executed by me, subject to this express provision and declaration, that if from any cause these presents shall be found invalid or ineffectual, then the foregoing revocation shall become *ipso facto* void and null."

On 28th July 1877 he executed a codicil to this trust-deed and settlement, which codicil was subscribed by his wife in token of her approval thereof, by which he, *inter alia*, bequeathed to her, in addition to the provision of £150 confirmed as above mentioned in his said trust-settlement, the sum of £300, to be her property, and to be managed and disposed of by herself, but subject to the declaration that by acceptance thereof she should be bound, so far as necessary, to apply the same, and the income thereof, along with the liferent income of her children's shares

of the residue of his trust-estate provided to her in his said settlement, to the maintenance and education of her said children during the subsistence of her said liferent, while they resided in family with her, and were unable to maintain themselves. That sum of £300 was to bear interest at 5 per cent. per annum from the date of his decease until paid, but it was not to be payable to her until the expiry of twelve months after his decease, unless his trustees should find it convenient to pay the same sooner.

On 12th December 1878 he further executed a second codicil to his trust-deed and settlement, which was likewise subscribed by his wife in token of her approval. It contained directions to his trustees to retain from any share of the trust-estate falling to the said Peter Lowden, or to his issue, the said sum of £500, and any charges that might be incurred in relation thereto; and provision was likewise made with regard to any other advances that might be made by him to his said son Peter Lowden, and the vouching thereof.

In the distribution of the trustor's estate among his widow and children, questions arose as to what effect should be given to the trust-deed and codicils executed subsequently to the marriage-contract. Accordingly this Special Case was presented to the Court for opinion and judgment. In it the first, second, third, and fourth parties respectively were—the trustees appointed by the trustor under his trust-deed and codicils relative thereto, his widow, his children by his first marriage, and his children by his third marriage. In the ninth article of the Special Case it was stated that the second and third parties were willing that the trust-estate should be distributed entirely under and in terms of the said trust-settlement and the codicils thereto; but an arrangement to this effect could not be made until the rights of the fourth parties, who were minor, should be ascertained. If the provisions for both the third and fourth parties under the first deed were testamentary and revocable, then the trust-settlement and codicils would receive full effect, and no question arose as to the rights of the parties *inter se*. If, on the other hand, the provisions in the first deed were pactional and irrevocable as to the fourth parties, the later arrangements of the trustor for the distribution of his estate among his widow and children were disturbed, and various questions arose in regard to the first parties' powers and course of management of the trustor's estate, and also particularly between the second and third parties as to paying or setting aside funds to pay the widow's provisions, and between the fourth parties and the other parties hereto as to whether the fourth parties could take any benefit whatever under the said trust-settlement and codicils while they claimed as creditors under the marriage-contract.

The questions submitted to the Court were—“(1) Whether the first deed has been in its entirety revoked or superseded by the subsequent trust-settlement and codicils? (2) Whether the provisions of the first deed in favour of the third parties hereto have been validly revoked or altered in the manner and to the effect contained in the subsequent trust-settlement and codicils? (3) Whether the provisions of the first deed in favour of the fourth parties hereto have been validly revoked

or altered in the manner and to the effect contained in the subsequent trust-settlement and codicils? (4) Whether the second party hereto is entitled to all or any of the additional provisions made in her favour by the trust-settlement and codicils; and whether all or any of the said provisions are to be charged upon the trust-estate, in the manner and to the effect directed in the said trust-settlement or codicils; or are any and which of the said provisions to be charged exclusively on the shares of residue falling to the third parties hereto? (5) In the event of the answer to the third question being in the negative, are the fourth parties hereto entitled, in addition to the provisions in their favour in the first deed, to take any benefit under the trust-settlement and codicils, and if so, what? (6) Are the first parties hereto entitled to the sole and exclusive administration and management of the whole estate, heritable and moveable, left by the testator, and to hold and dispose of the said estate to and for behoof of the second, third, and fourth parties hereto, according to their respective rights and interests."

It was argued for the first, second, and third parties:—The provision of £150 to the truster's widow contained in his marriage-contract was so absurdly inadequate that she would have been entitled in law to claim additional aliment from his estate. The truster was never divested by the marriage-contract, but remained the owner of the *universitas*, and could therefore make any subsequent provision he pleased with a view to reasonable increase, so long as it was not a fraud on the contract.

Authorities—*Stair*, iii., 5, 52; *Fraser's Husband and Wife*, ii., 968-9, 1417; *Fraser*, Feb. 13, 1677, M. 12,944; *Champion, &c. v. Duncan, &c.*, Nov. 9, 1867, 6 Macph. 17.

It was argued for the fourth parties:—The marriage-contract was an onerous irrevocable deed partaking of nothing of the character of a testamentary deed. Its provisions therefore fell to be strictly complied with, and the subsequent deeds fell to be disregarded as repugnant thereto.

Authorities—*Advocate-General v. Trotter*, Nov. 17, 1847, 10 D. 56 (see Lord Fullerton's opinion); *Marshall's Executors v. Lord Advocate*, March 20, 1874, 1 R. 847; *Moir's Trustees v. Lord Advocate*, Jan. 7, 1874, 1 R. 345; *Bruce v. Glen*, Feb. 7, 1761, M. 13,036.

At advising—

**LORD JUSTICE-CLERK**—A number of questions have been presented for our consideration under the branch or head of law which we have been discussing, but I do not think in the circumstances before us they present any material difficulty.

The questions between the parties arise under (1st) an antenuptial contract or deed dated 9th March 1870, between Peter Lowden, merchant in Dundee, and Margaret Wisely Coupar, who became his third wife; and (2d) the trust-disposition and deed of settlement of Peter Lowden, dated 17th July 1874, which was also subscribed by his wife, and two codicils thereto, the one dated 28th July 1877, and the other the 12th December 1878. By the first deed Mr Lowden made a provision of £150 to his wife in the event of his death, which has still to be paid; while the result of the settlements as regards Mrs Lowden, if the settlements are also to receive effect, is,

that there fall to be added to the £150 a dwelling-house believed to be of the value of £400, the liferent of the household furniture (to cease on her marrying again), a bequest of £300, and the liferent of her own two children's two-fifth shares of the estate.

Six questions are submitted to us, but the principal of these is the fourth—"Whether the second party hereto is entitled to all or any of the additional provisions made in her favour by the trust-settlement and codicils; and whether all or any of the said provisions are to be charged upon the trust-estate, in the manner and to the effect directed in the said trust-settlement or codicils; or are any and which of the said provisions to be charged exclusively on the shares of residue falling to the third parties hereto?"

The position of the parties is set forth in the ninth article, and I need not advert to it further.

In the first place, the rights of children to general provisions of conquest under a marriage-contract, although they are to a certain extent stateable as debts in certain circumstances, and give a certain amount of *jus crediti*, do not interfere with the reasonable administration by the husband of his own domestic affairs, and the position of his wife and children.

The real question is, What was the good faith of the obligation undertaken to the wife—for she was the other party—and in favour of the children, who have a right and interest under the deed as being an onerous deed in their favour? What was the real meaning of this deed?

I said in the course of the discussion, and it strikes me very strongly, that one peculiarity of this case is, that there was a family by a Mr Lowden's previous marriage, and the husband and wife were bargaining about that. And what they bargained was that all were to be put on the same footing at the husband's death—that is to say, that the amount of conquest was to be equally divided. I think it difficult indeed to maintain that that being the nature of the contract, and of the thing contracted for, any effect will be given to that contract which will entirely upset the other deeds, or that they are to upset that contract. The husband here faithfully carried out the contract with one very trifling exception. His ultimate settlement gives his wife enlarged provisions, but his right to do so was a right that he unquestionably retained notwithstanding the clause in the contract which said that £150 should be paid to her at his death "in full of all legal claims which she should be entitled to, and which sum she, by her signature thereto, thereby accepted in full of all her legal claims against him or his said estate as his widow or otherwise." The only thing that can be said is that the children's share to which they will ultimately succeed on the death of their mother is to be liferented by her, she having got a subsequent provision to that effect from her husband, who had power to grant it. I do not think anything more was intended than I have indicated; and on the whole matter I am of opinion that the second deed does not go beyond a fair and reasonable construction of the intention of the parties in the marriage-contract, and consequently that the questions should be answered in favour of the widow.

**LORD YOUNG**—I am of the same opinion. The

questions before us are not framed in such a manner as to elicit exactly the answers which I should have supposed—agreeing as I understand with your Lordship—it would be desirable to return. For it is asked, first—“Whether the first deed has been in its entirety revoked or superseded by the subsequent trust-settlement and codicils?” And secondly—“Whether the provisions of the first deed in favour of the third parties hereto have been validly revoked or altered in the manner and to the effect contained in the subsequent trust-settlement and codicils?” The third question is—“Whether the provisions of the first deed in favour of the fourth parties hereto have been validly revoked or altered in the manner and to the effect contained in the subsequent trust-settlement and codicils?”

So that all these refer to revocation; and I do not think we have here any question about revocation. The question is as to the extent of liberty which the marriage-contract left the father, and whether he has abused it. I am of opinion that the marriage-contract has left him at liberty to make a reasonable provision for his widow. At the time when he entered into the marriage-contract in question Mr Lowden had been twice married. By his first marriage he had three children alive; by his second he had none, alive or dead. Apart from the provision he made for his wife, he provides that his children by his first marriage, and any children he may have by the marriage he is then entering into, shall share in his fortune equally. That is the whole provision of the contract—that whatever he shall leave at his death, whether it be large or small, or anything at all, he shall leave at his death to his children by whatever marriage he has entered into, and divide it equally among them. That, I say, is the whole provision apart from the provision to his wife. And the provision to the wife is certainly about the most wonderful I ever saw. It is neither more nor less a direction to pay her £150, and that then she might go about her business. She is to have a sum of £150 in full of all legal claims which she may be entitled to, and of which sum she, “by her signature hereto, accepts in full of all her legal claims against me or my estate, as my widow or otherwise.”

Now, I say I have rarely seen such a provision made in favour of a widow by an antenuptial contract of marriage. Suppose there had been none at all, I do not think the contract otherwise would have prevented the husband from making rational provision in favour of the unprovided for widow. Indeed, that is too clear to be matter of argument. He might, notwithstanding the terms of the contract, have made a provision in favour of his widow, assuming that she was not provided for. But here we have a provision in favour of the widow, and it amounts to the sum of £150. I think that is not a rational provision. I do not understand how it has got into the deed. One almost is led to suppose it must have been £150 a-year that was meant. It might, however, have been 150s. for that matter. Does the contract preclude him from increasing, or tie him up so that he shall not increase, this ridiculously inadequate provision to a reasonable one? I think not. Upon the same principle, that he could have made a provision in her favour in the absence of any provision whatever, I think he is at liberty to

increase up to a rational amount this provision of £150. And that was what he proceeded to do, with the concurrence of the wife herself, three or four years after the contract was entered into. And he certainly made a provision in her favour moderate enough. The provision was, that whatever shares of his estate her own children should be entitled to upon the footing of the equality which had been bargained for between him and her in the marriage-contract, she should have the life interest of, under an obligation to maintain those children. That I think a fair and rational provision, and not *contra fidem tabularum nuptiarum*, and quite within the power of the husband, and that without any revocation of the former deed, but in the exercise of the liberty which he possessed notwithstanding the deed. I am not prepared to give proper expression to it at this moment, but I should have wished that the question had been put somewhat in this form—Whether the deed of 1874 is contrary to the husband's right, or an excess of the liberty that was left to him after the execution of the deed of 1870? I should be prepared to answer that question by saying that he was not by the deed of 1870—that is, by the marriage-contract—precluded from making the deed of 1874, which accordingly in my opinion ought to receive effect.

LORD CRAIGHILL—I have arrived at the same opinion. I am glad that I have been able to do so, because, apart altogether from any legal consideration, the deed granted by the late Mr Lowden as a testamentary deed was reasonable in itself and satisfied in a reasonable way the claims of all who came under it. The deed, which is a testamentary deed, is one as regards the terms and meaning of which there is no controversy between the parties.

It appears that the testator had entered into three marriages. In regard to the third, he had entered into an antenuptial marriage-contract, by which he made provisions, in the first place for his wife, and in the next place for the children of the marriage, and at the same time for the issue of his previous marriage with Miss Mudie.

The question that has arisen here is, Whether or not the hands of the testator were tied up when he made the trust-deed, so that he was prevented from doing anything which, as regards the widow and as regards the children of their marriage, was inconsistent with the provisions to be found in the antenuptial marriage-contract? I think that, so far as regards the wife and children of the marriage, that was a contract and not a testament. It is also clear that that which was left to the trustees or conveyed to the trustees for the purposes set forth in the marriage-contract was the *universitas* of Mr Lowden's succession. And it is established that where *universitas* is in such circumstances as the *universitas* here, then the estate is subject to the reasonable acts and deeds of the person whose it is.

That being so, I am of opinion that the testator was entitled to increase the provision that was given by the marriage-contract in favour of his wife. It was the best thing that could have happened for all concerned, because, as has been suggested by my brother Lord Young, the provision for his wife in that deed is no provision at

all. So far as appears, the wife had no fortune of her own, and £150 could not by any possibility maintain her until the end of her days; and when once it was spent, which it would be soon, then if there was no other provision for her she must have turned on the estate left by her husband and claimed as matter of law what he has wisely left her as matter of provision under the trust-deed of 1874. Of course, if it turned out that the provision given in favour of the wife was an unreasonable one in itself—that, so to speak, he had robbed others that she might be unreasonably enriched—the law would not confirm the exercise—such an exercise—of the power which the husband possessed. But these provisions which have been given in the end are not more than reasonable provisions, and therefore I think they ought to be sustained.

The difficulty I had for a moment was with regard to the imposition, so to speak, of that portion of the provision which was created in favour of the wife out of the liferent of two-fifths left to the children of the marriage. But everything taken into account, and looking at the powers which the husband unquestionably has over all parts of the succession, I quite agree with your Lordships in thinking that as regards the effect the thing cannot be interfered with as being contrary to the faith of the contract.

The Court therefore found that the second party was entitled to the additional provisions made in her favour by the trust-settlement of 17th July 1874, and the codicils of 28th July 1877 and 12th Dec. 1878, and that the said provisions were entitled to be charged on the trust-estate in the manner and to the effect directed by the trust-settlement and codicils; and that the first parties were entitled to the sole administration and management of the trust-estate; and lastly, that it was unnecessary to answer any of the other questions.

Counsel for First, Second, and Third Parties—R. V. Campbell—Kennedy. Agents—Duncan, Archibald, & Cuninghame, W.S.

Counsel for Fourth Parties—Guthrie Smith. Agent—W. B. Glen, S.S.C.

Friday, June 3.

FIRST DIVISION.

[Lord Rutherford-Clark,  
Ordinary.

POWRIE v. LOUIS.

*Forgery—Adoption—Bill.*

Circumstances in which allegations of the adoption of a forged acceptance of a bill held not to be proved. *Observations on the onus probandi* in such cases.

The complainer in this case was Archibald Powrie, 8 Crofts Lane, Dundee, and the respondent was Albert Louis, bill discounter and money lender, St Vincent Street, Glasgow. On the 31st July 1880 there was presented to the complainer for

payment a bill, dated Glasgow the 29th April preceding, for £275, 10s., drawn by John C. Baldie upon, and said to be accepted by, the complainer. This bill was blank endorsed by Baldie and Louis, and was presented by the Clydesdale Bank, Dundee, for payment. The complainer refused to retire the bill, on the ground the acceptance thereto was not his, and that he knew nothing about the bill. Thereafter the bill was protested, and the complainer was charged at the instance of Louis. This was a suspension of that charge.

Louis denied that the acceptance was a forgery, but ultimately his main defence was rested on alleged evidence of adoption by the complainer.

On a proof the following facts appeared:—Louis was slightly acquainted with the complainer, and more intimately with J. C. Baldie, the complainer's nephew. He discounted the bill for Baldie, from whom he also, as he alleged, took a receipt for the amount, the receipt being produced. He took no precautions to satisfy himself that the complainer's acceptance was genuine, although he had previously had experience of doubtful acceptances in bills which he discounted for Baldie. He however alleged that on three separate occasions the complainer, when the bill was mentioned to him, answered "that it was all right," or words to that effect—on 20th, 27th, and 31st May. The substance of the evidence regarding these occasions, particularly the last, appears from the opinions *infra*. It was also contended by the complainer that the alleged receipt by Baldie above mentioned was a forgery. Baldie had absconded.

The Lord Ordinary (RUTHERFURD-CLARK) suspended the charge, adding the following note—"The first question is, whether the complainer's name is forged? The Lord Ordinary is of opinion that it is forged. The evidence is all one way, and the comparison which is instituted between the complainer's true signature and the signature on the bills removes all doubt.

"But the respondent alleges that the complainer adopted the bill. The case for adoption consists in the alleged admission by the complainer of his liability as acceptor, and in the allegation that in consequence of that admission the respondent advanced £25, 6s. to Baldie, the drawer of the bill in question, in part payment of a bill for £70, of which the respondent was acceptor, but which was not then due.

"The evidence is very contradictory, and the case turns on the credence which is to be given to the witnesses. The Lord Ordinary did not take the proof, and has in consequence lost some means of judgment.

"It is peculiar that the respondent says that in addition to the bill he took a receipt from Baldie, dated 30th April 1880, in which Baldie acknowledges that he received £275, 5s. 10d. for a bill drawn on A. Powrie, Dundee. Such a receipt is unusual. It was not necessary, as the indorsation of the bill gave the respondent a right to recover the contents. But a greater peculiarity is, that so far as can be ascertained by a comparison of the receipt with the admittedly genuine signatures of Baldie, the receipt is a forgery. The signature upon it bears no resemblance to Baldie's genuine signature, and there is much room for the observation that it was manufactured in order to establish that the