

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 granter, 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 granter 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 granter 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 granter until his death. It had no clause dis-