Tuesday, July 11.

SECOND DIVISION.

EDMISTON, PETITIONER.

Trust-Settlement—Pupil's Maintenance and Education—Administrator-in-Law. In a petition at the instance of a father of three pupil children, an advance from the interest of money belonging to them authorised to be made to him as an individual for their maintenance and education, he, although in embarrassed circumstances, being stated by the trustees in charge of the money as the most proper person to have charge of the children.

Observed (*per* Lord Neaves), that, as administrator-in-law, he was a creditor, and could not apply to the equitable jurisdiction of the Court by petition, but must proceed by ordinary action.

Mr Edmiston's three pupil children were entitled under the trust-deed of their maternal grandfather to a sum of about £22,000, yielding a free income of £880, subject to a deduction of £150, paid to Mr Edmiston under his marriage-contract. During Mrs Edmiston's lifetime this money was liferented by her, and the whole income was paid to her by her father's trustees. For some time after her death they paid to Mr Edmiston £500 a-year for his children, but latterly refused to do so without judicial authority. The children had all along resided with him. He accordingly presented this petition "for himself, and as administrator-in-law" for the children, stating that some years ago he met with reverses in business, and that the income of the children's means was necessary to enable him to maintain and educate them in the manner in which they had lived during their mother's lifetime. He therefore prayed the Court to ordain Mr Miller's trustees to make payment to him, "as administrator-in-law for his children, and for their behoof," of the free annual income, or otherwise to ordain them to make payment to him of such portion of the free income as to the Court should seem proper for the suitable maintenance and education of the children.

The trustees lodged answers, in which they stated that they were advised that the petitioner might be held to be domiciled in England, and that, if so, they were not authorised to continue the payment without the authority of the Court. They stated at the bar that they considered the petitioner the most proper person to have the charge of his children, and to disburse any money that might be advanced for their maintenance and education.

Lancaster for petitioner.

Balfour for respondents.

At advising—

Lord Benholme—I have considerable doubts as to the rights of this father as administrator-in-law. We have no sufficient evidence as to his guardianship in England, and in respect of his domicile, and that of the children, we cannot look on him as a Scotch guardian. But in our position as protectors of all minors we can surely authorise the trustees to draw on this fund for what is necessary for the children, and pay the money to him, as a proper person to have charge of the children, and a trustworthy dispenser of the money.

Lord Neaves—I am of the same opinion. I could not countenance this petition as at the instance of this father as administrator in-law. As administrator-in-law he is a creditor, and ought to have brought an ordinary action. But he applies, not only in that capacity, but for himself, and he applies to us as a court of equity, and says, my circumstances are embarrassed, and my children cannot be supported in a manner becoming their position and prospects unless you allow them an allowance out of their money. There is no objection to him,—so far from that the trustees state that he is the proper person to educate and bring up his children, and I can see no objection to giving him an allowance for their maintenance and education, as suggested.

Lord Justice-Clerk and Lord Cowan concurred.

Agents for Petitioner—Webster & Will, S.S.C.

Agents for Respondents—Jardine, Stodart & Frasers, W.S.

Saturday, July 15.

FIRST DIVISION.

PAGAN *v.* PAGANS & FORDS.

Process—Expenses—New Trial. Circumstances in which the defenders were found entitled to the expenses of the first trial, though the pursuer had been successful in it, the pursuer having abandoned the action after the verdict in the first trial had been set aside, and a new trial granted.

In this case, which was brought for reduction of the trust-deed and settlement of the late Mr Pagan of Clayton, writer and banker in Cupar-Fife, an issue was sent to a jury, on which they returned a verdict in favour of the pursuer, who was the deceased's eldest son. The defenders (Fords) moved for a rule to show cause why a new trial should not be granted. After a hearing upon the rule, which was granted, their Lordships came to be of opinion that the rule should be made absolute and a new trial granted. When the case came up on the defenders' motion to fix the day for the new trial, the pursuer appeared, and put in a minute, stating that in the first trial he had effected the only object he had in view, and cleared his own reputation as a man of business from certain imputations which he had considered put upon it, and he did not intend to prosecute the action farther, but would consent to absolvitor going out.

The case thereafter came up on a motion for absolvitor, with expenses, on the part of the defenders.

Solicitor-General (Clark), with him Lee and Watson, for the defenders, contended that the expenses of the first trial, which had been reserved by their Lordships upon granting a new trial, in accordance with the general usage of the Court in such cases, should now be given him. They urged that where the first trial failed through the miscarriage of the jury, the practice was to give no expenses to either party. But here the pursuer, taught by the experience of the first trial, did not think proper to go to a second, but consented to absolvitor going out, on the verdict in the first being set aside. Referring to the pursuer's minute, he endeavoured to show that the pursuer had not brought the action so much to get his father's deed set aside as to free himself personally from what he considered a

slur cast upon his professional character, and to keep the Clayton estate in the family. Being frustrated in this object for the present, he had abandoned the action, and should therefore be held liable in the full expenses. Reference was made to the cases of *Lyell* v. *Gardyne*, 20th Nov. 1867, 6 Macph. 42, and *M'Bride* v. *Williams*, 22d May 1869, 7 Macph. 790.

GORDON, D.-F., ASHER and CAMPBELL SMITH, for the pursuer, vindicated his good faith in bringing the action, and contended that no expenses should be given. They referred to the cases of *Miller's Trustee* v. *Shield*, 31 Jan. 1863, 1 Macph. 380; *Neville* v. *Clark*, 6 Feb. 1864, 2 Macph. 625; *Burns* v. *Allan & Co.*, 20th Dec. 1864, 3 Macph. 269; *Stewart* v. *Caledonian Rail. Co.*, 4 Feb. 1870, 8 Macph. 486.

At advising—

LORD PRESIDENT—The Court are of opinion that the defenders must have full costs. They do not wish to disturb the ordinary rule that, where there are two jury trials, the party who is ultimately successful is not entitled to expenses in the first trial in which he has not been successful. But this is a very special case, and the Court being of opinion that there were no grounds for alleging insanity in the deceased, and that the action ought never to have been brought, consider that the defenders should get their expenses.

Agents for Pursuer—Murdoch, Boyd & Co., S.S.C.

Agents for Defenders—Macrae & Flett, W.S.

Saturday, July 15.

SECOND DIVISION.

M'WATT AND ANOTHER (DAVIDSON'S TRUSTEES) *v.* DAVIDSON AND OTHERS.

Mortis causa *Settlement—Liferent and Fee—Provision to Children—Legacy.*

(1) A testator executed a *mortis causa* deed of settlement, by which he conveyed certain leasehold subjects to his children in liferent for their respective liferent uses allenarly, and certain of his grandchilden in fee, and the remainder of his property to trustees for certain purposes. Three of the children forfeited their liferent interests by claiming legitim, contrary to the scope of their father's settlement. *Held* (aff. judgment of Lord Gifford) that the interests thus set free did not form intestate succession, or enlarge the right of the fiars, but fell to be conveyed to the trustees for behoof of the residuary legatees who were injured by the repudiation of the settlement.

(2) Circumstances in which a legacy was held to have lapsed into residue.

(3) A testator directed his trustees immediately after the death of his wife, to whom he left an annuity, to convert into cash any part of his estate remaining unrealised, and that the whole residue should as far as possible then be divided among his whole grandchildren then surviving, *per capita*, share and share alike, "declaring that the interest of my said residuary legatees shall become vested at the period of my death, but the shares falling to them shall only be payable on their reaching the period of twenty-one years of age respectively; and declaring further that until that time shall arrive the interest of their several shares shall be expended for their support and education, as to my said trustees may seem best at the time." *Held* (*rev.* judgment of Lord Gifford) that a grandchild born after the testator's death, but in the lifetime of his widow, was not entitled to participate in the residue.

1. On 30th December 1867 James Davidson, merchant in Rothes, and distiller at Macallan, executed a deed of settlement, which proceeded on the narrative that he had resolved to settle his affairs in order to prevent all disputes after his death. The deed consisted of a direct conveyance of five leasehold subjects to certain parties in liferent and fee respectively, in the terms stated below, and a conveyance of the remainder of his whole means and estate to trustees for the purposes therein mentioned. The narrative to the conveyance of the leasehold properties was as follows:—"Considering that I am possessed of certain heritable subjects situated in the village of Rothes, on which dwelling-houses have been erected by me and my predecessors therein, and which are held by me in virtue of certain leases from the Earl of Seafield, have therefore, for the love and favour which I have and bear to the persons afternamed and designed, but with and under the liferent, reservation, power, and faculty after expressed, assigned, conveyed, and made over, as I do hereby assign, convey, and make over, to the said parties the heritable subjects hereinafter specially conveyed to them, as follows, *videlicet.*" The conveyances which gave rise to the questions discussed in this case were the second, third ,and fifth, which were in the following terms:—"*Secondly*, I do hereby assign, convey, and make over to James Davidson, my son, presently residing in Rothes, during all the days of his lifetime, but for his liferent use allenarly, whom failing, or at his death, to his nearest heirs whomsoever, in fee, all and whole that tenement of ground in New Street of Rothes, with the houses built thereon, presently occupied by himself, marked number 34 on a plan of the new town or village of Rothes drawn by George Brown, land-surveyor. *Thirdly*, I do hereby assign, convey, and make over to my daughter Agnes Davidson or Falconer, wife of William Falconer, at present residing in Aberdeen, during all the days of her lifetime, but for her liferent use allenarly, and expressly excluding the *jus mariti* or right of administration of the said William Falconer, or of any future husband the said Agnes Davidson or Falconer may marry, either as to the subjects themselves, or the rents or yearly profits thereof, and at her death to her eldest son, whom failing her eldest daughter, and whom failing her nearest heirs and assignees in fee, all and whole that tenement of ground in New Street of Rothes, marked No. 61 on the said plan. . . *Fifthly*, I do hereby assign, convey, and make over to and in favour of Helen Mantach, daughter of William Mantach, in Burnside Street of Rothes, as long as she remains single and of good character, during all the days of her lifetime, for her liferent use allenarly, and after her death or marriage; or in the other event foresaid to my daughter Elspet Davidson or Mackintosh, wife of William Mackintosh, now in Australia, during all the days of her lifetime, for her liferent use allenarly, whom failing, or at her death, to James MacIntosh, her eldest son, his heirs and assignees, all and whole my