

(Scotland)

# Howden v Sibbald, 11 Shaw 561 (1833)

COURT OF SESSION.

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THOMAS HOWDEN, and ARCHIBALD TODRICK, Petitioners.—*Sol.-Gen.* No. 230.

*Cockburn—Sandford.*

WM. SIBBALD and Others, Respondents.—*D. F. Hope—Milne.*

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Sibbald.

*Judicial Factor—Curator Bonis.*—A party wrote a letter to two of his friends, requesting them, in the event of his supervening incapacity, to take the management of his affairs and person, in respect of the peculiar circumstances in which he was placed with his family; he delivered the letter to one of these friends; and incapacity supervened;—interim authority granted to the friends to take the management of his affairs, with the usual powers; reserving the question, whether they were entitled to a permanent appointment.

ON 30th July, 1827, the Rev. Dr Sibbald, then above 70 years of age, wrote the following letter to Messrs Howden and Todrick:—“ My dear Friends,—From the peculiar circumstances in which I am placed with my family, I request that you, or either of you, will take the management of my affairs, and of my person, and draw such sums from my account with the Bank of Scotland as may be necessary for the support of me and my family, should Providence prevent me, by indisposition, to attend to these concerns myself; and I hereby empower you, or either of you, exclusively to take management of my affairs and person, while I may be incapacitated by indisposition. I am, &c.

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“ I will deliver this mandate to a friend, who will give it to you, when necessary to be acted upon. W. SIBBALD.”

On 23d February, 1833, Messrs Howden and Todrick presented a petition to the Court, setting forth that since 1826 Dr Sibbald and his wife had lived separately, and that a disagreement had subsisted between him and some of the other members of his family; that in 1825, symptoms of palsy had threatened Dr Sibbald, who was apprehensive of their recurrence, and of his being thrown upon the care of those members of his family; that he had therefore written the letter above quoted, and delivered it to Howden; and that he was now incapable of acting for himself, in proof of which a medical certificate was produced. They also stated that they had been requested to make advances for the support of the Doctor's family, in terms of his letter, and that they had done so. They prayed the Court “ to appoint them to the office of curators to the person and effects of Dr Sibbald, in terms of his letter to that effect; or to grant warrant and authority to the petitioners to take the management of the person and affairs of Dr Sibbald, with the usual powers; or to do otherwise,” &c.

Dr Sibbald's youngest daughter, as well as his brothers and sisters, consented to the petition. It was opposed by Mrs Sibbald, and by two sons and one daughter, who contended that it was incompetent for Dr Sibbald to appoint curators to himself; that the nearest agnate could serve

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to the office, notwithstanding the Doctor's letter; and that the petitioners had no title to make the application; but if it were competently made, one of Dr Sibbald's sons ought to be named curator, or a neutral person should be named by the Court. They also alleged, that Dr Sibbald's mind was too much impaired to leave him capable of executing so important a letter at the time when he did so.

The petitioners denied the allegation of Dr Sibbald's mental incapacity at the date of writing the letter, and contended, that as a father had the power of naming tutors to his children during their non-age, a fortiori, he had the power of selecting trustworthy friends to be curators to himself, in the event of supervening disease or imbecility, and that even the service of a tutor-at-law could not supersede the one nomination, more than it could the other.

LORD BALGRAY.—A very important question is raised here, whether a man, seeing age and infirmity coming on, and having full confidence in some of his friends, and at the same time having a distrust of his kindred, has the power of providing for the management of his estate, and the guardianship of his person, during any supervening incapacity, by selecting his approved friends, and naming them to these offices. This is a question too important to be finally decided upon so brief consideration as it has yet received, and I think that an interim order merely should be pronounced at present. Nothing should be done, in the meantime, to imply that Dr Sibbald had not the power assumed in his letter.

LORD GILLIES.—This is a very grave question. The petitioners state that Dr Sibbald and some of his family were on unfriendly terms, and that he was apprehensive of being placed under their control, in the event of that incapacity which has now supervened. With a view to provide against this, he selected two friends in whom he had confidence, and requested them to take the care of himself and his affairs. This was a most reasonable proceeding on his part, and I can see nothing *ex facie* to make me doubt his mental capacity at the time of writing the letter. If that can be established, the case will take a different aspect, but at present it cannot be assumed. The friends selected by Dr Sibbald have acceded to his request. This seems to place them very much in the position of parties accepting a trust. If it were merely a trust-conveyance of his estate, conferring the administration of it, during his life, on the petitioners, it would clearly have been within the power of Dr Sibbald. But, in substance, the letter appears to have at least a near approximation to this. It is said that the service of a tutor-at-law would put an end to the nomination in this letter. I am not, at present, prepared to admit this. I think the letter should receive a favourable construction, and as a man may prospectively provide for the disposal of his affairs in the event of his death, so I incline to think he may in the event of the civil or intellectual death, arising from mental incapacity, which may precede decease. These are points requiring to be maturely considered; at present I think an interim order merely should be pronounced. The proposed appointment of a neutral person is liable to this objection, that it might prejudice the question as to the effect due to the letter of Dr Sibbald, if the Court were now to dispossess the parties named by him, and who have already had some intromissions.

LORD CRAIGIE.—I concur generally in the views expressed by Lords Balgray and Gillies. No. 230.

LORD PRESIDENT.—I think it right to grant an interim authority to the petitioners, and to supersede quoad ultra. I have great doubt whether a letter like this could exclude the tutor-at-law, if he were served. Mar. 9, 1833.  
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THE COURT “superseded the farther advising of this petition until the third sederunt day of May next; and in the meantime granted warrant to, and authorized the petitioners to take the management of the affairs of Dr Sibbald, with the usual powers.”\*