tion 35 of the Agricultural Holdings Act 1883. Was he to be deprived of the benefit of the Act because with his farm of 33 acres he held another and separate subject, namely, the hotel? Neither farm nor hotel was an adjunct to the other. They were each independent and separate subjects, though held under one agreement.

At advising—

LORD PRESIDENT—The subject let is the hotel at Fort-Augustus, with the new hotel adjoining it, and certain lands. The question is, does the 35th section of the Agricultural Holdings Act 1883 apply? By that section it is provided that in certain cases six months' notice of removal must be given. The 35th section makes it clear to what the Act is to apply and to what it is not to apply. It is not to apply to urban property. This is an hotel and some fields, originally of 33 acres, now extending only to 28 acres. I do not think it is possible to say that this case falls under the terms of section 35? Nor do I think that the 42d section gives any aid to the argument of the reclaimer. It requires explanation itself though an explanatory section. There is nothing contradictory between sections 42 and 35 when read together.

LORD MURE and LORD ADAM concurred.

LORD SHAND was absent.

The Court refused the reclaiming-note.

Counsel for Suspender — Asher — Strachan. Agent—W. Officer, S.S.C.

Counsel for Lord Lovat—Guthrie. Agents—J. C. Brodie & Sons, W.S.

Friday, December 17.

FIRST DIVISION.

[Sheriff of Dumfries.

KERR (HALLIDAY'S EXECUTOR) *v.* HALLIDAY'S EXECUTORS.

Sheriff—Jurisdiction—Executor—Whether fact of Confirmation confers Jurisdiction?

The executors of a deceased person took out confirmation in the Sheriffdom of his domicile, Dumfries. Neither of them lived in that Sheriffdom, one of them being resident in Ayrshire and the other in Glasgow, to which latter place the executry funds were removed. *Held* that they were not subject as executors, by reason of the confirmation, to the jurisdiction of the Sheriff of Dumfries.

William Halliday and his sister Mary Halliday died domiciled in the county of Dumfries. Mary Halliday's executor raised an action in the Sheriff Court of Dumfries for the sum of £200 against the executors of William Halliday. The pursuer averred that for a number of years previous "to his death the said William Halliday had been accustomed at his sister's request to uplift periodically the interest upon a deposit-receipt in name of the deceased Mary Halliday for £200 sterling at the British Linen Company Bank, Sanquhar, and he paid the interest to her for her own behoof. On 8th January 1885 the said William Halliday uplifted the interest on said deposit and re-deposited the principal sum of £200 in his own name, along with a sum of £586 which had been previously in deposit in his own name." It was to recover this sum of £200, with interest from 8th January 1885, that this action was raised. The defenders, the two executors-dative *qua* next-of-kin of William Halliday, had taken out confirmation in the Sheriff Court of Dumfries. One of them lived in Ayrshire and the other in Glasgow, and they had transferred to the British Linen Company Bank in Glasgow all the funds which stood at the late William Halliday's credit in the branch of that bank in Sanquhar, and which formed the bulk of the executry estate.

The defenders denied the pursuer's averments, and pleaded, *inter alia*—"(1) The defenders not being subject to or under the jurisdiction of this Sheriff Court, the action falls to be dismissed with costs."

The Sheriff-Substitute (HOPE) repelled these pleas and allowed a proof.

"*Note.*—. . . The executors have, I consider, subjected themselves to the jurisdiction of this Court in matters pertaining to the executry estate. They have applied for and received from this Court the office they hold, and they have obtained confirmation, and have recorded in the books of the Sheriffdom an inventory of the estate. I do not see to what tribunal they are more made amenable.

"Mr [Dove] Wilson, after noticing the case of *Black* v. *Duncan* [December 18, 1827, 6 S. 261], remarks—'In the same way it is thought that executors would be liable to the jurisdiction of Sheriffdom where the deceased lived, where the executors were confirmed, and where the estate was being wound up, though the majority of them should be actually resident without the Sheriffdom.'

"I go further than this, and would say, 'though they be all resident without the Sheriffdom.'

"I think that support for this view can be obtained by a consideration of the terms of the bond of caution which cautioners for executors have to sign, and which must have been signed by the cautioners for the defenders. The form, after stating that the cautioner binds and obliges himself that the sum contained in the testament 'shall be made free and furthcoming to all parties having interest therein as law will,' contains the following clause—'and I subject myself, my heirs and successors, to the jurisdiction of the Sheriff of Dumfries and Galloway in this particular.'

"I never heard of a cautioner being subjected to greater liability than the principal, and if an executor is not subject to the jurisdiction of the Court which appointed him, I cannot see why his cautioner should be required to subject himself to it."

On 21st October 1886 the Sheriff (MACPHERSON), on appeal, adhered.

"*Note.*—The defenders live in different counties, neither of them in Dumfriesshire. The jurisdiction of this Sheriffdom is that to which the late William Halliday was subject when he died—he was domiciled and he left his property

in it, and in it the defenders took out confirmation. It is *forum conveniens*, and were there any competent objection it should have been waived and the jurisdiction prorogated. But I concur in holding that there is jurisdiction over the defenders in a question affecting the amount of the deceased's estate. I think, further, that by taking out confirmation the jurisdiction has been by implication prorogated. The defenders have had recourse to this jurisdiction, and must answer in it." . . .

The defenders appealed to the Court of Session, and argued — The first plea-in-law for the defenders was well-founded. The Court of Session was the only competent tribunal where both executors and almost the entire estate were without the Sheriffdom. The mere fact of confirmation could not give the Sheriff jurisdiction in such a case—*Watt* v. *Richmond's Executors* (*per* Lord Fraser, when Sheriff of Renfrewshire), reported in Guthrie's Sheriff Court Cases, 241. The furthest point to which the Court of Session had extended its jurisdiction over an executor residing in a foreign country appeared from *M'Morran* v. *Cowie*, January 16, 1845, 7 D. 270, 17 Scot. Jur. 135, and *Ferguson* v. *Douglas, Heron, & Company*, 3 Pat. Ap. 503 (*per* Lord Loughborough), p. 510; *Black* v. *Duncan*, December 18, 1827, 6 S. 261; *Magistrates of Wick* v. *Forbes*, December 11, 1849, 12 D. 299, 22 Scot. Jur. 71. [The Lord President—"Is the Sheriff's position not supported by the case of *Preston* v. *Melville*, March 29, 1841, 2 Rob. App. 88, 8 Cl. & F. 1 (*per* Lord Chancellor Cottenham), p. 12?"] That view of the decision in the case of *Preston* had been doubted in the House of Lords in *Orr Ewing's Trustees* v. *Orr Ewing*, July 24, 1885, 13 R. (H. of L.) 1. The view of the Sheriff here was just the contention of the pursuers in *Orr Ewing* v. *Orr Ewing's Trustees*, February 29, 1884, 11 R. 600, which was negatived on appeal. Even in an action on a contract the *locus solutionis* of which was within the Sheriffdom, a foreigner must be cited personally before the Sheriff had jurisdiction over him—*Pirie* v. *Warden*, February 20, 1867, 5 Macph. 497. The form of the bond of caution had nothing to do with the question. The liability of a cautioner was no higher than that of his principal, and if the latter was not subject to the Sheriff's jurisdiction neither would the former be liable in spite of the clause in the bond.

No appearance was made for the respondent.

At advising—

Lord President—I am disposed to sustain this appeal, and to hold that the Sheriff has no jurisdiction. If these executors had been foreigners it is evident that they could only have been sued in the Supreme Court, which is the *commune forum*. Where one executor lives within the Sheriffdom and is administering the estate, it might be otherwise, and I feel much inclined to agree with Lord Fraser in the view which he took in the case which has been cited to us. No doubt confirmation was obtained in the Sheriff Court of Dumfries, but the reason for that was that the deceased was domiciled in the county. The executors are not connected with that Sheriffdom in any way, and they went there only to get confirmation, and so obtain possession of the executry estate. They got possession of it on the footing that they should duly account for it, but they can only be called to account for it where they may be competently cited. There is nothing in the fact that the Sheriff granted confirmation to confer jurisdiction on him in such a case as the present. The executors have carried the estate outside the Sheriffdom, and in these circumstances I cannot see on what ground the pursuer could maintain that there was jurisdiction. If, as Lord Adam has remarked, the mere fact of confirmation gave jurisdiction against executors exclusively in the confirming Court I could understand the pursuer's position. But as an executor may be sued anywhere where he himself is, and an action may be brought against him in any Court to whose jurisdiction he is himself subject, it is quite plain that there cannot be exclusive jurisdiction in the Court from which the confirmation proceeded, and if there is not exclusive jurisdiction, I do not see how the fact of confirmation can confer any jurisdiction unless the executor is otherwise subject to it. I am for sustaining the defenders' first plea-in-law.

Lord Mure—I am of the same opinion. At first I had some doubt on the point, and felt inclined to hesitate in coming to a different conclusion from the Sheriff. I was apprehensive that a decision contrary to his views of jurisdiction might make it necessary in all such cases for parties to be put to the expense of coming to the Court of Session as the *commune forum*. But I think this may be obviated wherever there is one executor subject to the jurisdiction of the Sheriff Court of the deceased's domicile. I further agree that there is no exclusive jurisdiction in the Sheriff Court which granted confirmation.

Lord Shand and Lord Adam concurred.

The Court sustained the plea of no jurisdiction and dismissed the action.

Counsel for Defenders (Appellants)—Lorimer—Boyd. Agent—Thomas Hart, L.A.

Friday, December 17.

FIRST DIVISION.

[Sheriff of Aberdeen.

STRONACH (WILSON'S TRUSTEE) *v.* BARR (FRASER'S TRUSTEE).

Process—Res judicata—*Identity of Interest.*

Goods were supplied for use in a business which was being carried on in name of W., and of which he was ostensibly proprietor. He became bankrupt. In an action by the assignee of the persons who supplied them, against F., and also against himself as trustee in W.'s sequestration, to which office he had been appointed, it was decided by a final judgment that the true principal in the business for which the goods were supplied was F., and that the goods had been really supplied on his credit. Decree was therefore given against F., as well as against W.'s trustee, for the price. F. also became bankrupt. In a competition between W.'s trustee and F.'s trustee for the articles which the creditors had supplied, *held*