

Graham Stewart. Agents—Menzies, Bruce-Low, & Thomson, W.S.

Counsel for the Claimant Arthur Moubray—Dundas—J. H. Millar. Agents—Melville & Lindsay, W.S.

Counsel for the Claimants S. & J. Philipps—M'Lennan. Agent—William Gunn, S.S.C.

Thursday, June 27.

FIRST DIVISION.

[Sheriff of Chancery.

FULTON v. EGLINTON.

Process—*Ex parte* Proceeding—Unopposed Petition for Service—*Res judicata*.

Held that the decision of the Sheriff of Chancery, dismissing a petition for service which no party appeared to oppose, did not constitute *res judicata* to the effect of excluding a second petition for service by the same person.

On 10th September 1883 William Stephen John Fulton, 2 Salisbury Square, Edinburgh, presented a petition to the Sheriff of Chancery for service as nearest and lawful heir of tailzie and provision in general to Archibald, 11th Earl of Eglintoune, Lord Montgomery and Kilwinning, who died in 1796 without leaving any male issue. The petitioner averred that the deceased Earl had a younger brother, James Montgomery, who predeceased him, and who was otherwise called James Fulton or Fultoune of High Warwickhill, Dreghorn, Ayrshire. He maintained that he was the great grandson of James Montgomery and great-great-grandson of Alexander, ninth Earl of Eglinton, and contended that as such he was the nearest and lawful heir-male of tailzie and provision in general to Archibald, 11th Earl of Eglinton under a series of titles enumerated in the petition.

No appearance was made for the existing Earl of Eglinton, and on 15th February 1884 the Sheriff of Chancery (MUIRHEAD) pronounced the following interlocutor:—“Finds that the petitioner has failed to establish that his great-grandfather, James Fulton of Fultowne, designed in the petitioner's service to him in 1877, as ‘farmer in High Warwickhill, Dreghorn, Ayrshire,’ was a lawful son of Alexander, 9th Earl of Eglinton, and younger brother of Archibald, 11th Earl: Therefore refuses to serve as craved, dismisses the petition, and decerns.”

On 14th March 1893 Mr Fulton presented another petition to the Sheriff of Chancery, craving the Court to serve him as heir to Archibald, 11th Earl of Eglinton as in the former petition. The petitioner made the same averments of fact as previously, but founded his claim on a new document.

Answers were lodged by the Earl of Eglinton, who pleaded *res judicata*.

On 2nd March 1895 the Sheriff of Chancery (WALLACE) dismissed the petition in respect that “in the present petition there is no relevant averment of *res noviter*

*veniens ad notitiam*, and that the judgment of 15th February 1884 is *res judicata*.”

The petitioner appealed, and argued—There could be no *res judicata* in an *ex parte* petition where no appearance was made for any other person.

At advising—

LORD PRESIDENT—I think that the Sheriff's interlocutor cannot stand. The only operative finding is that a previous judgment of the Sheriff of Chancery is *res judicata*. Now, the proceedings in the former petition are printed in the appendix, and it appears that the petition was an *ex parte* proceeding on the part of the present petitioner which the Sheriff disposed of without appearance being made for the Earl of Eglinton. *De facto*, the Earl of Eglinton had been served years ago, but without two parties being in the field no judgment can be *res judicata*. I think therefore that the case must go back to the Sheriff, all pleas of parties being left open.

LORD ADAM, LORD M'LAREN, and LORD KINNEAR concurred.

The Court sustained the appeal and remitted to the Sheriff.

Counsel for the Appellant—Party. Agent—Party.

Counsel for the Respondent—Rankine—C. K. Mackenzie. Agents—Blair & Finlay, W.S.

Thursday, June 27.

SECOND DIVISION.

[Lord Kincairney, Ordinary.

GRIERSON, OLDHAM, & COMPANY, LIMITED v. FORBES, MAXWELL, & COMPANY, LIMITED.

Contract—Assignment—Title of Assignee to Sue on Contract.

The defenders entered into a contract by which they agreed to pay a firm of wine merchants the sum of £200 per annum by half-yearly instalments for the advertisement in their wine list of a non-intoxicating wine, in which the defenders were interested. Before the second instalment had been paid the wine merchants transferred their business, including the benefit of all contracts to which they were entitled, to a limited company.

Held (*aff.* judgment of Lord Kincairney) that, as the contract involved mutual obligations and *delectus personæ*, it was not assignable, and that the company had therefore no title to enforce it against the defenders.

Upon 1st January 1894 Messrs Forbes, Maxwell, & Company, who were the patentees of a non-alcoholic wine named “Mersano,” entered into an agreement