

*tees v. Nicholson*, July 13, 1888, 15 R. 914. (2) All parties not called. The defenders were not the proper respondents in this action. They were sued as trustees, and could only be personally responsible for their own wrongdoing in their management of the trust-estate, not for that of third parties. It was not said that they were wrongdoers; it was the pursuer's case that the Shotts Iron Company had caused the damage; they therefore were the proper persons to answer for the alleged damage. (3) Relevancy. In any case, the pursuer ought to have made more specific allegations of what had been done and the damage caused.

At advising—

LORD TRAYNER—The Sheriff-Substitute has sustained three pleas maintained by the defenders and dismissed the action. The first of these pleas is the most important, namely, that the Sheriff has no jurisdiction. I have had some difficulty about that plea, but on consideration of the question and of the authorities bearing upon it have come to the opinion that the judgment of the Sheriff-Substitute is wrong, and that the plea ought to be repelled. The defenders are trustees under a Scotch trust, and are administering it in Scotland. The trust-estate, so far as we know, is all situated in the county of Lanark, and one of the defenders (there are but two) resides in that county. In these circumstances, and having regard to the opinions expressed in the case of *Haldiday's Executors*, 14 R. 251, and by Lord Fraser (as Sheriff of Renfrew) in the case of *Watt* (Guthrie's Sheriff Court Cases, 241) I am of opinion that the Sheriff has jurisdiction in the present case, which is brought to sustain a claim arising directly out of the management and administration of the trust in Lanarkshire.

The plea to the relevancy of the action should also be repelled. The Sheriff-Substitute desiderates a specification of certain details which the pursuer from the nature of the case cannot possibly give, and details, which, if the case has any foundation at all, are already known to the defenders or their tenants. There is enough averred to cover the pursuer's demand.

As to the third plea of all parties not called, I think the pursuer was quite entitled to direct his action against the persons whom he thought liable for the damage he says he has sustained, and that he is not bound to call any other. He may not be able to establish liability against the present defenders, but that is no reason for holding that he is not entitled to have his case against them tried without calling other defenders against whom at present he advances no claim.

LORD YOUNG and the LORD JUSTICE-CLERK concurred.

LORD RUTHERFURD CLARK was absent.

The Court pronounced this interlocutor—  
“Sustain the appeal, and recal the interlocutor appealed against: Repel

the 1st, 3rd, and 4th pleas-in-law for the defender, and remit the cause back to the Sheriff-Substitute to proceed therein as accords,” &c.

Counsel for the Pursuer—Vary Campbell—Dewar. Agents—Drummond & Reid, S.S.C.

Counsel for the Defenders—Asher, Q.C.—Moncreiff. Agents—Webster, Will, & Ritchie, S.S.C.

Saturday, July 6.

## SECOND DIVISION.

### CAMPBELL, PETITIONER.

#### *Parent and Child—Custody of Illegitimate Child.*

A petition by a mother for the custody of her illegitimate pupil children, whom she had handed over five years previously to the care of a home for children, *refused*, the Court being of opinion that it was not in the interests of the children to deliver them to the petitioner.

Jane Campbell, weaver, residing at 1 New Buildings, Cambusbarron, presented a petition to the Court, in which she averred “that the petitioner in or about the month of October 1889, being in very destitute circumstances, was induced to place Maggie Ann Campbell and Susan Campbell, two of her children, in the Children's Home, Whinwell House, Stirling, and the said children were duly admitted into that institution by Miss Annie K. Croall, the matron. The petitioner is a mill-worker, and her object was to have the children temporarily taken care of until she was able to find work and provide a home for them. About six months after the date of the admission of the children to the said institution, the petitioner, having found work, was anxious to resume custody of her said children, and has frequently and urgently applied to Miss Annie K. Croall to deliver them to her, but she has refused to do so. The said children, Maggie Ann Campbell and Susan Campbell, were at the time of their admission into the home aged five and four years respectively, and they are both illegitimate.” She prayed the Court “to find the petitioner entitled to the custody of her said children, and to decern and ordain the said Miss Annie K. Croall liable in expenses.”

Miss Croall lodged answers, in which she averred that the two children were admitted into the Home at the pressing and reiterated request of the petitioner; that when admitted they were both sickly and starved little creatures in a deplorable condition of health; that no application had been made for their re-delivery by the mother till quite recently; that since 1890 no payment had been made by the petitioner to account of the board of her children, and that the petitioner had not visited

her children for nearly three years, though under the rules of the Home she could have seen them at any time on Saturdays. She further averred—"The children are now nine and ten years of age respectively, and neither of them are robust. They require careful attention, good clothing, wholesome, nourishing food, and education suited to their years and health. But these they cannot get in the house and surroundings of the petitioner. If she continues in work in a factory she cannot attend to the children. The petitioner's eldest daughter is not of an age or otherwise suitable to be entrusted with them, and is, besides, at work all day in a factory. The petitioner has hitherto failed to pay the very moderate sum of 3d. per day for their support, and there is no prospect of her being able to provide the much larger sum that would be necessary to support them in a house of her own. The house at present occupied by the petitioner is quite unsuited for two delicate children in addition to two other inmates. It is a single room scantily furnished, with one bed. The health of the children has improved during their residence in the Home, but both of them would without doubt relapse in health if handed over to such care as the petitioner can bestow on them."

The respondent founded upon the Custody of Children Act 1891 (54 Vict. cap. 3), and submitted that "in the circumstances above set forth at common law the petition should be refused, in respect that it would be prejudicial to the children's health and other interests to be delivered to the petitioner; and further, in respect that the case falls under one or other or both of sections 1 and 3 of the Act of 1891."

The Court, on 30th May 1895, remitted to Mr Bremner P. Lee, advocate, to inquire into the facts set forth in the petition and answers, and to report. Mr Lee's report was as follows:—"I visited the petitioner in her own house without any previous warning. The house consists of only one room, but it is not a very small room, and is exceedingly airy and well-kept; I was much impressed by the clean and tidy state in which everything was. The petitioner seemed to be genuinely anxious to have her children with her, and to be confident of her ability to support and look after them. She was, indeed, conscious of the superior advantages which they enjoy in their present home, but professed her desire to do all she could to prevent them from being losers if they returned to her. This I am confident would be her aim to the full extent which her means allow. The petitioner works as a weaver, and so far as employment in that industry can be said to be constant, she is constantly employed. The work is, however, so fitful that while in a good week her earnings are about 10s., they are liable in other weeks to be as low as 5s.; the average between these two figures may, I think, be fairly taken to represent her weekly earnings over the year. The petitioner's eldest daughter, a girl of eighteen, also illegitimate, lives with her, and professes her willingness to assist in keeping the children;

her present earnings are 9s. a-week. Both women's work necessitates their absence during most of the day. The petitioner has to pay a rent of £2, 10s. per annum for her house. I made independent inquiries as to the petitioner's character, and satisfied myself that for the last two years—that is, during all the time she has resided in her present house, she has been a respectable, sober, and industrious woman. No allegation has been made against her present character, and I do not think that any such allegation could be in any way supported. The same may be said of the daughter who lives with her. I also saw Miss Croall and the two children. In Miss Croall's presence the children showed that they regarded her with affection and confidence, and when I saw them alone they professed the same feelings. It is difficult to see how the children could have any view but one in these proceedings, which they regard with the keenness of intelligently interested parties, to whom success means staying where they are, and failure a return to a life of which they know nothing, but fear much. Their mother they hardly know, while Miss Croall has been their benefactress; of home life they know nothing except at a time when its misery and want were exchanged for their present comfortable home. Besides this, I fancy that the contrast has been brought home to them often, not only directly, but by frequent observation of the relief of the wants of new inmates admitted to the Homes. The children are frank and intelligent, and I questioned them on the subject. They both wished to stay where they are, and where, they say, they are comfortable and happy. The respondent suggested to me means of inquiring into the alleged abandonment of the children by the petitioner, but I have not thought it necessary to enter into this question. The petitioner admits that when in utter want she was glad to entrust her children to anyone who could keep them, but the present character and conduct of the petitioner have seemed to me to make any former abandonment unimportant if she can show present willingness and ability to support her children. On that question I can add nothing, except that any assistance which the petitioner may receive from her eldest illegitimate daughter can be enforced by no legal obligation, and may be at any time withdrawn on her marriage. The small earnings of the petitioner alone afford little promise of comfort to her children if they return to her, and any care or attention during the day must be precluded by the necessary absence of the mother. While the children are at present strong, they both, and especially the elder, have suffered from former neglect, and have only been brought to their present healthy state by care and attention which they could not expect in their mother's home."

Argued for the petitioner—There being no allegation in the report of her unfitness to take charge of her children, she had an absolute right to them—*Macpherson v. Leishman*, June 4, 1887, 14 R. 780.

Counsel for the respondent was not called on.

At advising—

LORD JUSTICE-CLERK—The real question in this case is whether, in the circumstances disclosed, it is in the interests of the children to be left where they are or transferred to the custody of their mother. It is always a question of circumstances, and, after giving the case the best consideration I can, I have come to the conclusion that it is not right for the Court to interfere with the present custody of these children.

LORD YOUNG—I am, without any hesitation, of the same opinion. The leading consideration for us is, what is best for the children? They were not taken from the mother, but were put by her where they are. They have been there for some time, and it has been ascertained on inquiry that they have been there with great advantage to themselves; and I think that, in view of what the reporter says, we must come to the conclusion that their continued residence there will be for their advantage. Now, when a mother in such circumstances makes an application to us to order her children to be sent to her, we are not only to consider her legal right, but also to consider her relation to them as her illegitimate children. She only earns seven shillings a week, irrespective of what her eldest daughter is earning, and she can suggest nothing in the way of advantage to be gained by their being handed over to her. I agree with your lordship entirely in thinking that, upon the whole information before us, we shall do what is best for the children by refusing to interfere, and we do this by refusing to grant the prayer of this petition.

LORD TRAYNER—I have had some difficulty in this case, arising from the fact that, even though the children are illegitimate, the proper place for them is with their mother, not merely for the upbringing of the children, but for the sake of the mother herself. If I had seen my way to give the mother the custody of the children, the leaning in my mind would have been in that direction. But I think, in the circumstances, that it is best for the children that they should remain where they are at present. I can only add that the mother should have all reasonable access to her children, and if in the future she can gain their confidence and affection, she will very soon get them back, as they will very shortly attain the age at which they may choose their own place of abode. In the meantime I cannot help saying that it appears to me to be for the best interests of the children that they should remain where they are.

LORD RUTHERFURD CLARK was absent.

The Court refused the petition.

Counsel for the Petitioner—M'Ewan.  
Agent—William Green, S.S.C.

Counsel for the Respondent—Lorimer.  
Agent—Stuart & Stuart, W.S.

Wednesday, July 3.

FIRST DIVISION.

[Lord Low Ordinary.]

DELHI AND LONDON BANK,  
LIMITED v. LOCH.

*Foreign—Judgment Debt—Decree Destroyed after Period in accordance with Rules of Foreign Court—Presumption.*

The pursuers sued L's executrix for £6000 alleged to be due to them under a decree which they had obtained against L in the Court at Delhi in 1860. They stated that, in accordance with the practice of the Delhi Court, the original decree had been destroyed in 1877, and that they were accordingly unable to produce it, or an official extract of it. They, however, produced an extract from the Court Books for the year 1860, bearing that judgment had been given in their favour.

The Court *dismissed* the action as irrelevant, *holding* that the necessary presumption arising from the destruction of the decree was that it had ceased to be operative within the jurisdiction of the court which pronounced it, and therefore that it could not be enforced by the courts of this country.

*Agreement—Agreement by Debtor to Make Payments to Account of Judgment Debt if Decree not Enforced—Decree Destroyed according to Practice of Court—Whether Debtor's Executor Barred from Objecting to Validity of Claim.*

The pursuers sued L's executrix for a sum which they alleged to be due to them under a decree obtained by them in a foreign court against L more than thirty years previously. They stated that they were unable to produce the original decree, or an official extract of it, as it had been destroyed in accordance with the practice of the foreign court, but pleaded that the defender was not entitled to object to the non-production of the extract-decree, in respect that they would have enforced it against L but for an agreement concluded between them and L, whereby he undertook to pay instalments to account of the debt during his life, and, in consideration of this undertaking, they on their part agreed not to take proceedings in execution of the decree during his life.

The Court *dismissed* the action as irrelevant, *holding* that the question of the validity of the pursuers' claim was in no way concluded by the alleged agreement.

This was an action at the instance of The Delhi and London Bank, Limited, against Mrs Loch, executrix of John Adam Loch, for payment of £6000.

The origin of the debt claimed was a bond granted by the deceased J. A. Loch in 1847 in favour of the Delhi Bank Corporation for