

the provision of the will was to hold good. That was a provision which made the child a fiar, and I think that the intention of the testator would not be carried out in any other way than by holding Charlotte to be a fiar at her death.

Therefore on principle and on authority I am of opinion that the representatives of Charlotte are entitled to the sum of £1168 in question.

LORD TRAYNER— I am of the same opinion. The right conferred on Charlotte under the will was a right of fee vesting in her *a morte*, but with a postponement of the beneficial enjoyment until she attained majority or was married. The codicil altered this to the extent of giving a life-rent of her share to Charlotte, and the fee to her issue if she had any. But this, in my opinion, and according to the authorities cited to us, had no further effect than to limit Charlotte's right to a life-rent only in the event of her having issue, which not having happened, her original right of fee belonged to her unburdened at her death. The clause of survivorship relied on by the second parties does not appear to me to take the case out of the rule settled by the authorities, and to which I have given effect.

LORD MONCREIFF— I agree with the result arrived at by all your Lordships. Both on authority and principle I am of opinion that the first question should be answered in the affirmative.

The Court answered the first question in the affirmative, and found it unnecessary to answer the other questions.

Counsel for First and Second Parties—  
Craigie. Agents—Snody & Asher, S.S.C.

Counsel for Third Party—  
Graham Stewart. Agents—T. F. Weir & Robertson, S.S.C.

Counsel for Fourth Parties—  
Bartholomew. Agents—Galloway & Davidson, S.S.C.

Wednesday, June 7.

## SECOND DIVISION.

### M' MAHON v. MATHIESON.

*Executor—Personal Liability—Small-Debt Decree—Process—Small Debt Act 1837 (1 Vict. c. 41).*

A, a creditor of B, brought an action in the Small Debt Court for the amount of his debt against C, who was B's trustee and sole executor. The summons was at the instance of A, against C, "commission agent, 21 Guthrie Street, Edinburgh, trustee and sole executor on the estate of the deceased B." The decree following upon this summons "found the within designed C as libelled, defender, liable to the pursuer in the sum of £3, 12s." with expenses. Upon this decree A proceeded to poid the personal effects of C, who had in-

formed him that he had no funds belonging to B's estate in his possession. C thereupon brought an action in the Sheriff Court to interdict A from proceeding with the poiding, and averred the facts above set forth. A in his defence alleged that the decree in the small-debt action was a personal decree, having been pronounced in the Small Debt Court in spite of C's defence, then stated, that he had no funds belonging to the deceased, which defence the Sheriff-Substitute had found not proved. In the action of interdict the Sheriff-Substitute and the Sheriff held that the pursuer's averments were irrelevant.

On appeal the pursuer maintained that the small-debt decree was directed against him in his representative capacity only. The defender, on the other hand, contended (1) that a small-debt decree was necessarily directed against the pursuer personally, and (2) that in this case he was not sued and decerned against "as" trustee. The parties were at issue as to whether the pursuer had executry funds in his hands.

The Court recalled the interlocutors appealed against *in hoc statu*, and remitted to the Sheriff to allow the parties a proof of their averments before answer, the proof to be directed to the state of the executry funds (1) when the claim was first made; (2) when the small-debt action was raised, and (3) when the decree therein was pronounced.

This was an action brought in the Sheriff Court at Edinburgh by James M' Mahon, commission agent, residing at No. 21 Guthrie Street, Edinburgh, against A. A. Mathieson, M.D., Edinburgh, in which the pursuer prayed the Court to interdict the defender, and all others acting under his instructions, from selling, removing, or interfering with the goods or effects belonging to the pursuer, and in his house at 21 Guthrie Street, under an alleged extract-decree containing warrant to poid, dated 26th October 1898, and in particular certain specified articles which had been poided under that decree, and for interim interdict.

The material part of the summons upon which this decree and poiding followed was as follows:—"Whereas it is humbly complained to me by A. A. Mathieson, M.D., 41 George Square, that James M' Mahon, commission agent, 21 Guthrie Street, Edinburgh, trustee and sole exor. on the estate of the deceased Mrs Jane Ward, 5 College Street, Edinburgh, defender, is owing the complainer the sum of Three pounds twelve shillings, conform to statement of account hereto annexed, ending 16th July 1897, which the said defender refuses or delays to pay; and therefore the said defender ought to be decerned and ordained to make payment to the complainer, with expenses. Herefore it is my will," &c.

The sum sued for was the amount of an account for professional services rendered to the deceased Mrs Ward.

The decree pronounced upon this summons was as follows:—"At Edinburgh, the twenty-sixth day of October One thousand eight hundred and ninety-eight years, the Sheriff of the Lothians and Peebles finds the within designed James M'Mahon as libelled, defender, liable to the pursuer in the sum of Three pounds twelve shillings, with three shillings and one penny of expenses, and decerns and ordains instant execution by arrestment, and also execution to pass hereon by pointing and sale, and imprisonment if the same be competent after a charge of ten free days."

Upon 14th November 1898 "James M'Mahon, defender above designed," was charged to implement this decree.

On 18th November Mr M'Mahon's law-agent wrote to Dr Mathieson's law-agent intimating receipt of this charge, and pointing out that there were no trust funds. On 22nd November he wrote again to the same effect.

On 2nd December 1898 a sheriff-officer pointed certain of the pursuer's own effects in his house at 21 Guthrie Street. The pointing bore to proceed upon the decree above mentioned dated 26th October.

Thereupon on 5th December 1898 Mr M'Mahon raised the present action.

The pursuer averred that the decree of 26th October was against him "as trustee and sole executor on the estate of the deceased Mrs Jane Ward;" that he had repeatedly intimated through his law-agent to the defender that there were no trust-funds; that the effects pointed were his private property, and that the sheriff-officer, when about to proceed with the pointing, had been told so by the pursuer's wife in the pursuer's absence, but that notwithstanding he had proceeded with the pointing, and scheduled the effects referred to *supra*.

The defender averred as follows:—(Ans. 2) "The decree is referred to for its terms. Explained and averred that the decree was pronounced *in foro contentioso* after a defence had been stated by the pursuer to the effect (1) that prior to the lodging of the claim the pursuer had paid away all the funds of the estate; and (2) that he had no funds. The Sheriff held the pursuer failed to prove both defences. In these circumstances the decree pronounced was equivalent to a personal decree—at all events, it is a decree which necessarily implies execution against the defender's property."

The pursuer pleaded—"(1) The defender having wrongfully pointed the pursuer's goods and effects, the pursuer is entitled to obtain interdict against his selling the same. (2) The goods in question being the property of the pursuer, and he not being the debtor named in the decree condescended upon, the pointing of said goods is illegal and unwarrantable, and their sale ought to be interdicted."

The defender pleaded, *inter alia*—" (2) The pursuer's averments are not relevant nor sufficient to sustain the action. (3) The small-debt decree in question having been pronounced notwithstanding that the pursuer pleaded as a defence that he had no

funds, the present action being an attempt to review said decree is incompetent. (4) The pursuer being in possession of funds and property belonging to the said estate which he has secreted, the diligence complained against is competent."

A correspondence was produced from which it appeared that on 31st September 1898 the pursuer's law-agent wrote to the defender's law-agent stating that he had made no provision for the defender's claim, but that as it was manifestly preferable he would pay it, and that as there had been a claim upon the estate by another medical man he would require a detailed account. After receiving a detailed account he raised several objections to certain items in it, and to the preferable character of part of it, and offered to pay £1, 16s. in full discharge of the defender's claim. In this letter the pursuer's law-agent stated that he had not made provision for the pursuer's claim in winding up the the estate (which was not done till nine months after the death of Mrs Ward), as he had up till then no due intimation of it. Upon receipt of this letter by his law-agent, the present defender immediately raised the small-debt action above referred to.

On 5th December the Sheriff-Substitute (HAMILTON) granted interim interdict.

On 26th January 1899 the Sheriff-Substitute issued the following interlocutor:—"Sustains the second plea-in-law for the defender: Dismisses the action, and decerns: Finds the pursuer liable in expenses, and remits," &c.

Note.—"The Sheriff-Substitute is unable to distinguish between this case and that of *Jaffray v. Gordon & Waddell*, February 10, 1831, 9 S. 416, in which it was held that a small-debt decree directed against the trustee in a sequestration was *sua natura* a sufficient warrant for attaching his personal effects, that that was the plain meaning of the decree.

"As regards the present case, the pursuer suffers no real hardship in respect of the proceedings complained of, for the debt which he is called upon to pay is of trifling amount, and he has an undoubted claim of relief against the parties who take benefit from the executry estate in question. Further, it appears from the correspondence produced that he had funds in his hands at the time the defender's claim was first intimated to him. Why did he part with these funds without retaining enough to meet this claim?"

The pursuer appealed to the Sheriff (RUTHERFURD), who on 3rd March 1899 recalled the interim interdict, adhered to the Sheriff-Substitute's interlocutor of 26th January 1899, dismissed the appeal, and remitted the case to the Sheriff-Substitute, finding the pursuer liable in additional expenses.

Note.—"From the note appended to his interlocutor it is obvious that the Sheriff-Substitute intended the decree which he pronounced in the small-debt action referred to on record to be a decree against the present pursuer personally, and, holding that to be its plain meaning, he has

dismissed the present action as irrelevant. The Sheriff sees no reason to differ from the Sheriff-Substitute."

The pursuer appealed, and argued—The pursuer in the present action was only liable as trustee and not as an individual. The decision of this question depended upon the interpretation to be put upon the summons and the decree in the small-debt action. The account annexed to the summons, which was incorporated in the summons itself by reference, showed that the claim was and could only be (apart from special circumstances, of which there was no indication) against the present pursuer "as trustee." The decree was against "the within-designed James M'Mahon as libelled," which was equivalent to against "James M'Mahon, commission agent, 21 Guthrie Street, Edinburgh, as trustee and sole executor on the estate of the deceased Mrs Jane Ward." "As libelled" could not refer to the amount decerned for, as that was stated at length immediately afterwards in the decree. A particular person as executor was a different legal *persona* from the same person as an individual. Here the present pursuer had not been sued in the small-debt court as an individual at all. The small-debt summons and decree were therefore directed against the present pursuer in his representative capacity merely, and he could not be held personally liable under them—*Craig v. Hogg*, October 17, 1896, 24 R. 6; *Wilson v. Mackie*, October 22, 1875, 3 R. 18. In the latter of these two cases the instance, as appeared from an examination of the session papers, was against "William Wilson, executor," and so forth, and not against "William Wilson, as executor." The omission of the word "as" was therefore immaterial. Where a person was sued for a debt which was primarily due by an estate on which he was executor, he was *prima facie* not liable as an individual. He could not be held liable as an individual unless he had done something wrong or negligent. It was for the pursuer to show that the executor was personally liable, and that personal liability was intended under the decree founded on. The argument based upon the terms of the Small Debt Act and the forms in the Schedule thereto was unfounded. It was certainly quite unprecedented. There was no reason for excluding actions against persons in a representative capacity from the scope of the Act, and the words "all civil causes" and "debt or demand" were wide enough to include such actions. If, however, such actions were incompetent in the Small Debt Court, then this action being of that character was incompetent and could not support diligence against anyone. The case of *Jaffray v. Gordon*, February 10, 1831, 9 S. 416, was special. It was held there that personal liability must have been intended, because otherwise there would have been no object in bringing an action, and a claim made in the sequestration would have been sufficient. The present case was ruled by *Wilson v. Mackie, cit.*

Argued for the defender—(1) No decree

except a personal decree was competent in the Small Debt Court, and a defender could not therefore be decerned against in that court in a representative capacity merely. A summons brought for the purpose of constituting a debt against a deceased's estate was not competent in the Small Debt Court—See Small Debt Act 1837 (1 Vict. c. 41), Preamble and Schedule A, Nos. 1 and 7. The forms were imperative. If an action was brought in the Small Debt Court against a trustee or executor the Sheriff could only either dismiss the action, or find the defender personally liable upon some ground inferring personal liability against him, and it was to be presumed, if the Sheriff had found a defender liable under such circumstances, that he had found him liable personally. This was the ground of decision in *Jaffray v. Gordon, cit.*, a case which ruled the present. The presumption applied here, and in fact that was what took place. Apart from this, however, the defender here was not sued "as" trustee and sole executor. The omission of the word "as" was conclusive against him. The words "trustee and sole executor," and so forth, were merely part of his designation, and did not limit the effect of the decree—*Henderson's Trustees and Others*, May 20, 1831, 9 S. 618, *per* Lord Newton, Ordinary, at p. 621; *Graham v. Macfarlane & Company*, March 11, 1869, 7 Macph. 640. In *Craig v. Hogg, cit.*, the summons and decree were against the defender "as judicial factor," and that case was accordingly distinguished from the present. To escape personal liability it must be made quite clear that the decree against the person sued is only given against him in his representative capacity. That was not so here.

At advising—

LORD TRAYNER—I think the interlocutors appealed against are premature, and that the case before us cannot be determined without more information than we have at present with regard to the funds of the executry estate under the petitioner's administration. The petitioner avers that he has no executry funds whatever in his hands, which the defender denies. I think this question of fact must be inquired into; and am of opinion that the interlocutors appealed against should be recalled *in hoc statu*, and the case remitted to the Sheriff to allow the parties a proof before answer. The proof should be directed to the state of the executry funds, if any, in the petitioner's hands (1) at the date when the defender's claim was first made, (2) at the date when the defender raised his small-debt action against the petitioner, and (3) at the date when the decree was pronounced in that action. The expenses of this appeal to be dealt with by the Sheriff as part of the expenses *in causa*.

The LORD JUSTICE-CLERK and LORD MONCREIFF concurred.

LORD YOUNG was absent.

The Court pronounced the following interlocutor:—

“Sustain the appeal: Recal *in hoc statu* the said interlocutors appealed against: Remit the cause to the Sheriff to allow the parties a proof of their averments before answer: Find the expenses of this appeal to be expenses *in causa*, and remit to the Sheriff to dispose of the same accordingly.”

Counsel for the Pursuer—Kennedy—  
A. M. Anderson. Agent—W. R. Mac-  
kersy, W.S.

Counsel for the Defender—T. B. Morison.  
Agent—Peter Morison, S.S.C.

Wednesday, June 7.

## SECOND DIVISION.

[Lord Kincairney, Ordinary.

ROSS v. ROSS.

*Jurisdiction — Domicile — Husband and  
Wife—Divorce for Desertion.*

In an undefended action of divorce for desertion and for custody and aliment of two children brought on 14th October 1898 by a wife residing in Scotland against her husband residing in the United States of America, it was proved that the defender was born in Scotland and had been married to the pursuer in Glasgow in 1888, and that shortly after marriage they had gone to the United States, where the defender had remained ever since working as a compositor in various places. A letter was produced, dated New York, 12th September 1898, written by the defender to his sister, in which, after complaining of the state of trade in America, he wrote—“I will be in Scotland in the spring of next year.”

*Held* (aff. judgment of Lord Kincairney, *diss.* Lord Young) that the defender had never lost his Scottish domicile and that the Court had jurisdiction.

*Husband and Wife—Divorce for Desertion  
—Date at which Desertion Must be Proved.*

The pursuer in an action of divorce for desertion must establish as matter of fact that the other spouse has been in wilful and malicious desertion for four years immediately preceding the time at which the decree is demanded, and such an action will not be allowed to remain in Court till the four years necessary to entitle a pursuer to decree have run their course.

Circumstances in which *held* (aff. judgment of Lord Kincairney) that a wife residing in Scotland was not entitled to a decree of divorce for desertion against her husband residing in the United States of America.

On 14th October 1898 Mrs Jane Orwin Carlyle or Ross, wife of James Buchan Ross, and presently residing at 2 Hutchison Buildings, Sandbank, raised an action of

divorce for desertion and for custody and aliment of the two children of the marriage against the said James Buchan Ross, now or lately residing at 362 West Twenty-Third Street, New York, U.S.A., or elsewhere furth of Scotland. The summons was served edictally on the defender.

No defences were lodged, and on 17th December 1898 a proof was led before the Lord Ordinary.

The pursuer's evidence was to the following effect:—The pursuer and defender were both born and brought up in Scotland and were married in Glasgow on 7th November 1888. Shortly after the marriage the pursuer and defender went to America and lived in Philadelphia and Washington for some years, two children being born of the marriage. The defender was a compositor. He was a good tradesman, but irregular in his habits and unable to save funds. He was not very kind to pursuer. In the summer of 1893 the pursuer was poorly in health and her father wrote to her to come home. She did so with her husband's consent, taking the children with her. Her husband expressed his intention of following her to Scotland. She came to Glasgow in August 1893, and about May 1894 she went to stay at Sandbank, near Dunoon, where she had remained ever since. For some time after her return to Scotland she received letters from her husband. All the money she got from him was £3, and that was within the first six weeks of her return. She wrote letters to him asking him to do his duty to her—either to come home or send her money to go back or give her money to keep herself and her children. On 1st October 1894 she received a letter from her husband, which was produced. It was in the following terms:—“*Laurel Democrat Office, Laurel, Ind., October 1st 1894.*—My Dear Wife,—Your letter reached me safe, and I would have answered it a week ago, but I had neuralgia so bad that I was unable to do anything. Though your letter was very meagre, yet I was glad to hear from you. . . . When I sent you the last £1, I was out of work, and this past year has been an awful year in this country for idleness, and when I received your letter (the last one), in which you said if I did not send you money right away you would never write to me again. When I got that letter I was out of work. I would have sent you the money if I had had it, but God knows how it was with me. Many a day I went without a meal and could get work of no kind to do, and I went near no one that I knew. I put through a terrible winter, and I never will go through the same again—never. I wrote you in the month of , and that letter has never been answered, and I came to the conclusion that you did not want to write me. I have been here since May, and never one day has passed but I have thought of you and Charles and Cathie (the two children of the marriage). Now we have done very little since I came here, sometimes not more than two days a-week, but I will try and send you a little money in about a week from now. I will try and keep it up also for let me tell