

come to an end. But this view does not seem to have found favour with the parties, and although we have an unqualified discretion in the matter of terms and conditions, we should not exercise it by making such an arrangement, because if it is left to the Court to say how much of his stipend a minister ought to assign to his creditors, the stipend must be treated like any other heritable annuity which is subject to an annual burden, and the question for decision is, what part of the annuity the debtor may retain in order that his duties may be properly performed. At the same time we are to consider not only the present but also the future performance of those duties, and that in the case of a man of seventy it may become necessary to have an assistant, who would be required to be paid for his services. I am not sure whether that element was present to the mind of the Lord Ordinary, but looking to the future as well as the present, I agree with your Lordship that £120 is too large a proportion of this gentlemen's stipend to be taken by his creditors.

LORD KINNEAR was absent.

The Court pronounced this interlocutor—

“Recal the said interlocutor [of 21st December 1896]: Find the petitioner entitled to his discharge under the sequestration on condition that he assigns to his creditors the sum of £80 per annum out of his stipend as minister of the united parishes of Evie and Rendall during his incumbency as minister thereof until the whole debts due by him under the sequestration are paid, and on said assignation being granted, Grant commission to J. R. Cosens, Esq., Sheriff-Substitute at Kirkwall, to take the declaration of the bankrupt, and to report to the Lord Ordinary: Find neither party entitled to the expenses of the reclaiming-note,” &c.

Counsel for the Reclaimer—Crole. Agent—W. B. Rainnie, S.S.C.

Counsel for the Respondent—Cullen. Agent—James Gibson, S.S.C.

Tuesday, February 20.

### FIRST DIVISION.

DAVIDSON, PIRIE, & COMPANY

v. DIHLE.

*Process—Transference of Action—Foreign—Transference against Representatives of Deceased Defender.*

A foreigner against whom an action of damages, proceeding on arrestments *ad fundandam jurisdictionem*, had been raised died in the course of the procedure, after a reclaiming-note had been presented. The pursuer requested his representatives to assist themselves as parties to the action, and on their failing to do so used further arrestments, and lodged a note

craving the Court to transfer the cause against them, but to the extent only of enabling the pursuers to obtain decree *cognitionis causa tantum*. The pursuers failed to call certain of the representatives, whose addresses were unknown both to the pursuers and to the remaining representatives. Objection was taken to the transference by the defender's representatives on the ground of the failure to call the whole class, and also in respect that there was no authority for transforming an action originally instituted against a living person into one of constitution against his representatives. The Court *repelled* the objections and *transferred* the cause as craved.

On November 17th, 1897, Messrs Davidson, Pirie, & Company, fishcurers, Leith, raised an action against Heiner. Herm. Dihle, herring merchant, Stettin, proceeding on arrestments used *ad fundandam jurisdictionem*. The action was one of damages for breach of contract to purchase a consignment of herrings. Defences were lodged, and after certain procedure the Lord Ordinary (Low) pronounced an interlocutor repelling certain of the defender's pleas-in-law, and before further answer allowing the pursuers a proof of their averments of damage.

On 5th January 1899 the defender reclaimed, and the case was put out for hearing, but the pursuers received intimation that the defender had died on February 14th.

The pursuers presented a note to the Court, in which they made the following averments:—“The representatives of the said Heiner. Herm. Dihle have been requested to assist themselves as parties to the action, but they have not done so, and the pursuers are desirous that the cause should be transferred against the said representatives in order that the same may proceed. The pursuers have ascertained that letters of administration, or the equivalent thereof, were, of this date (April 4, 1899), taken out in the name of the following persons, being nephews and nieces of the deceased, viz.: Ewald Karl Max Freyer, criminal commissioner in Stettin; Max Wilhelm Bernhardt Freyer, veterinary surgeon in Grandenz; Klara Anna Amalie, widow of Farmer Paul Goetzoke, Waldows Hof, Stettin; Agnes Marie Fredericke, wife of Pastor Ludwig Fickert at Friebess; Ernest Martin August Dihle, headmaster in Pasewalk; Helene Johanna Marie, wife of Siegfried Heine-mann, merchant, Stettin; Sophie Fredericke Emilie Dihle, and Ernest Frederick Wilhelm Dihle, teacher, both residing in Berlin; and also in the names of Carl Zimmerman in Pasewalk, and L. Bergemann, cigar manufacturer, Stettin, as trustees of Karl Martin Dihle, Gustav Karl Wilhelm Dihle, Robert Heinrich Dihle, brothers of the deceased, and Auguste Wilhelmine, wife of August England, wheelwright, niece of the deceased, whose addresses are not known. Jurisdiction has been founded against the said representatives for the purpose of transference by arrestments *ad fundandam jurisdictionem* used of this

date (August 3, 1899). In view of the said transference the pursuers hereby restrict the conclusions of the summons to a conclusion for decree *cognitionis causa tantum*."

The pursuers craved the Court "to grant warrant for serving a copy of the summons and of this note upon the said representatives, and upon the said Pastor Ludwig Fickert and Siegfried Heinemann, as curators and administrators-in-law of their said wives and for their interest, and allow them to lodge objections thereto within eight days after service, and thereafter to dispose of any objections lodged, and to transfer the cause in common form against the said representatives in room and place of the deceased Heindr. Herm. Dihle, but that to the extent only of enabling the pursuers to obtain decree *cognitionis causa tantum*, all in terms of the statute."

Objections were lodged by Mr Dihle's representatives, in which they stated that "One of the persons named in the note under answer as a representative, viz., Auguste Wilhelmina, wife of August England, predeceased the said Heindr. Herm. Dihle, and died on 13th March 1852, leaving issue who are not called as representatives, although they are within the class of legal representatives of the deceased. The note is directed against Carl Zimmermann and

L. Bergemann, as trustees for the said Auguste Wilhelmina, wife of August England, neither the said parties nor one or other of them is trustee for the deceased Auguste Wilhelmina England. The objectors are all foreigners, and have not made up any title by confirmation or otherwise to any estate belonging to the deceased situate in Scotland. No letters of administration, or the equivalent thereof, have been issued in favour of the persons here called as representatives. They are not subject to the jurisdiction of the Courts of Scotland.

The objectors submit that the proceedings for transference adopted against them by the pursuers are incompetent, and *separatim*, that (on the assumption that jurisdiction can be competently founded against the representatives of a deceased foreigner by the use of arrestments), in the circumstances, jurisdiction has not been validly constituted against them by the proceedings founded on in the note, and that the transference sought should be refused. They further submit that the transference should be refused on the ground of *forum non conveniens*. The objectors are all foreigners, the domicile of the deceased was at Stettin, and the realisation and distribution of his estates must proceed there."

Objection was also taken to the validity of the arrestment, but was not pressed in the argument submitted to the Court.

The certificate of heirs of Mr Dihle in the Court of Stettin was as follows—"Stettin, 27th November 1899.—From the undersigned Court of Justice it is certified that Heinrich Hermann Dihle, merchant, who died on the 8th day of February 1899 at Stettin, his last place of habitation, without leaving any

will, leaves [Here follows a list of Mr Dihle's representatives, those who were called in the pursuers' note through trustees being described as "address unknown"] as sole lawful heirs."

Argued for pursuers—The course taken by them was the competent and usual one before taking any steps after Dihle's death; they were bound to transfer the action, and the method adopted by them was the right one—*Cameron v. Chapman*, March 9, 1838, 16 S. 907; *Houston v. Sterling*, February 3, 1824, 2 S. 564; *Ashton, Hodgson, & Company v. Mackrill*, 1773, M. 4835; *Forrest v. Forrest*, May 26, 1863, 1 Macph. 806. It was unnecessary to show that the defenders had an active title to the property, since they admitted that they were among the legal representatives. The action being one *cognitionis causa tantum*, the fact that all of the representatives had not been accurately called was quite immaterial—*Ersk. iv. 1, 60*; *Stair, iv. 34, 1*.

In the course of the debate the pursuers obtained leave to amend their note and correct an error in the name of one of the representatives called through their trustees, by substituting for the words "Auguste Wilhelmine, wife of August England, wheelwright, niece of the deceased," the words "August Wilhelm England, nephew of the deceased."

Argued for objectors—(1) There was no authority for transferring an action against a living person into one of constitution against his foreign representatives, or using it as a means of getting at his estate in this country—*Houston v. Stirling, supra*; *Forrest v. Forrest*, May 26, 1863, 1 Macph. 806. (2) Even if the action could be transferred in this method the pursuers had failed to call all the representatives, having called the deceased Mrs England instead of her son August England, and it lay on them to show that they had exhausted the whole of the next-of-kin—*Brown v. Rodger*, December 13, 1884, 12 R. 340; *Smith's Trustees v. Grant*, June 27, 1862, 24 D. 1142, at 1172.

LORD PRESIDENT—The objections to the transference are highly technical, and it appears to me that there is no substance in them.

The first contention of the objectors was that there is no authority for transforming an action against a living person into an action of constitution against his representatives, or using it as a means of reaching estate belonging to him in this country. That is a very far reaching proposition, and if well founded it would practically put an end to the procedure of transferring an action against the representatives of a deceased person, either for the purpose of obtaining a decree against them or of getting a decree *cognitionis causa tantum*.

The action is no longer pressed *ad omnia*; as the persons named in the minute stand only in a representative capacity, it would be imprudent to insist in it against them personally, and accordingly it is now insisted in only to the effect of obtaining decree *cognitionis causa tantum*, so as to

found recourse against any estate which the deceased had in this country at his death. The procedure adopted seems to me to be perfectly competent for this purpose.

The second objection stated was that the pursuers have failed to call all the representatives of the deceased. They have called all the known representatives; the three not called are described by their relatives, the present objectors, as address unknown. If the addresses of these persons are unknown to the objectors, and if indeed it is not known whether they are alive, how could the pursuers be expected to call them? The pursuers have called all the persons who have taken the step, apparently constituting in the courts of Stettin an *aditio hereditatis*. It seems to me that they have done enough. The objection would be intelligible if the objectors could show an interest to have the whole class of representatives convened, e.g., to share a personal liability, but they have no such interest when decree *cognitionis causa tantum* alone is sought.

The remaining objections, viz., that no funds forming part of the estate of the deceased had been attached by the arrestment, and *forum non conveniens*, were ultimately not insisted in.

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

The Court pronounced this interlocutor:—

“Hold the said cause of Davidson, Pirie, & Company against the said Heinrich Hermann Dihle as transferred against the parties named in said note, but *cognitionis causa tantum*, and discern,” &c.

Counsel for Pursuers—W. Campbell, Q. C.  
—Constable. Agents—Wallace & Pennell, W. S.

Counsel for Objectors — M'Lennan.  
Agents—Gunn & Winchester, S. S. C.

Tuesday, February 20.

#### FIRST DIVISION.

#### BURNS v. NORTH BRITISH RAILWAY COMPANY.

*Reparation—Workmen's Compensation Act 1897 (60 and 61 Vict., cap. 37), secs. 1, 4, and 7—Railway—Work on Siding in Course of Construction.*

A railway company employed a firm of signal-makers to erect signals on a new siding which they were in the course of constructing on their own ground and as part of their existing line. A workman in the employment of the signal-maker was knocked down and killed by a passenger train while engaged in fitting the signal wires.

Held that the deceased was employed “on” a railway on work of which the

railway company were undertakers, and which was an essential part of their undertaking, and not “merely ancillary or incidental” thereto, and accordingly that the railway company were liable to pay compensation to his relatives under section 4 of the Workmen's Compensation Act 1897.

The Workmen's Compensation Act 1897 provides (section 4)—“Where, in an employment to which this Act applies, the undertakers, as hereinafter defined, contract with any person for the execution by or under such contractor of any work, and the undertakers would, if such work were executed by workmen immediately employed by them, be liable to pay compensation under this Act to those workmen in respect of any accident arising out of and in the course of their employment, the undertakers shall be liable to pay to any workman employed in the execution of the work any compensation which is payable to the workman (whether under this Act or in respect of personal negligence or wilful act independently of this Act) by such contractor, or would be so payable if such contractor were an employer to whom this Act applies.”

“This section shall not apply to any contract with any person for the execution by or under such contractor of any work which is merely ancillary or incidental to, and is no part of or process in, the trade or business carried on by such undertakers respectively.”

By section 7 it is provided, *inter alia*—“(1) This Act shall apply only to employment by the undertakers, as hereinafter defined, on or in or about a railway, factory, mine, quarry, or engineering work.” . . .

“‘Undertakers,’ in the case of a railway, means the railway company.”

In a claim under the Workmen's Compensation Act 1897 at the instance of Mrs Mary Ann Carson or Burns, widow of James Burns, against the North British Railway Company, the following facts were found proved by the Sheriff of Lanarkshire (BALFOUR)—“(1) That the said deceased James Burns was at and prior to his death in the employment of Stevens & Sons, railway signal makers, Glasgow, and that on the 9th of August 1899, while he was at work fitting signal wires on the Edinburgh Suburban Railway, near Duddingston Station, he was knocked down by a passenger train and killed; (2) That the respondents were making three new sidings and a new connection with their main line on the fore-said railway, of all of which railways they were owners, and that they had contracted with Messrs Stevens & Sons to fit up new signals in connection with these sidings; (3) That the respondents never construct any new signalling apparatus, but that they keep a staff of men merely to maintain the signals in the same way as they keep a staff to maintain the permanent way; (4) That the appellants are the widow and children of the said James Burns, and were dependent on him; (5) That the wages earned by the said deceased James Burns from 20th August 1896 to 9th August 1899,