

coals and coalheughs within the bounds of the said lands of Morriston, and to use and dispone therefrom at our pleasure, with free ish and entry thereto, I and my foresaid giving satisfaction and payment to the said Robert Miller and his foresaid for all skaith, damage, or interest that they shall happen to sustain or incur therethrough." In the renewal of the investiture by the Duchess of Hamilton in 1698, the clause of reservation was—"Reserving always liberty and power to us, as superior of the said lands, to minerals and coalheughs, and for that effect to set down shanks within any part of the said lands; we always giving satisfaction for the damage they shall happen to sustain through leading or setting down of said shanks." This clause was inserted in all the after renewals of investiture, and is that which is contained in the deed by which the pursuer personally holds of the Duke of Hamilton. The defenders contend that the original form of the reservation was superseded by that of 1698, and that the special provision thus made for damages incurred by setting down shanks in the lands of Morriston must be read as having the effect of excluding all other descriptions of damage. The Lord Ordinary (KINLOCH) repelled this plea and "found it relevant to infer a liability for damages that the defenders, or either of them, have produced injury to the pursuer's land or the houses thereon by working the minerals beneath the same without leaving sufficient support to the surface; and appoints the cause to be enrolled, in order to the determination of the facts."

The defenders reclaimed.

W. M. THOMSON for them.

CLARK and SHAND in answer.

The Court adhered, LORD COWAN observing, that it was by no means clear that the precept in 1698 altered the reservation. It must be read with due reference to the original title. But, at all events, there was nothing in the titles which could deprive the pursuer of his claim to damages at law, apart from contract of any kind, if his lands had been injured by improper operations on the part of the defenders.

Agents for Pursuer—Donald & Ritchie, S.S.C.  
Agent for Defenders—George Wilson, S.S.C.

Tuesday, November 5.

## FIRST DIVISION.

### ROBSON v. WALSHAM.

*Jurisdiction — Executor — Foreign.* A domiciled Englishman was decerned executor-dative in a Scotch Commissary Court to a party deceased. He gave up no inventory, and was not confirmed. He held no funds in Scotland. *Held*, in an action against him as executor-dative by a creditor of the deceased, that he was not subject to the jurisdiction of the Court.

George Robson, accountant in Glasgow, brought this action against Sir John Walsham of Knill Court, in the county of Hereford, Baronet, as executor-dative decerned by the commissary of Edinburgh to the deceased Francis Garbett of Knill Court, for the purpose of receiving payment of certain sums due under bonds by Garbett and another, of which sums the pursuer was now in right. The defender pleaded no jurisdiction.

The Lord Ordinary (BARCAPLE) sustained the plea of the defender, and dismissed the action, adding the following note to his interlocutor:—

"The sole ground on which it is alleged that there is jurisdiction against the defender, who is domiciled and resident in England, is, that he has been decerned executor-dative *qua* next of kin of Francis Garbett. He has not given up an inventory, or been confirmed executor. Jurisdiction has not been constituted against him by arrestment, and it is not alleged that there are any funds in Scotland belonging to him, either as an individual or as executor; the action is for an ordinary debt, alleged to have been owing by Francis Garbett, at his death. In this state of the facts, the Lord Ordinary does not think that any of the recognised grounds for sustaining jurisdiction against a foreign defender can be held to exist in the case.

"The defender, before he was decerned executor, had obtained letters of administration in England. The Lord Ordinary does not doubt that if jurisdiction were constituted against him in the ordinary way, he might be sued in this Court for payment of Garbett's debt, as executor, and administrator in respect of his having taken up the estate in England, *Morrison v. Kerr*, M. 4601; *Munro v. Graham*, 1 D., 1151. In like manner, the Lord Ordinary must hold that, if the defender has realised executry funds under the title which he obtained in Scotland, which he has carried away, or which never were here, he might be sued in the English Courts independently of his obligation to account there for his administration under his English title. Any other rule would enable an executor to escape from all liability by leaving the jurisdiction in which he has confirmed and administered, and taking the funds with him.

"This is no violation of the principle fixed by the House of Lords in the case of *Preston v. Melville*, 2 Rob. App., 88, that 'the domicile regulates the right of succession, but the administration must be in the country in which possession is taken and held, under lawful authority, of the property of the deceased.' There is no question in the present, or any similar case, as there was in *Preston v. Melville*, as to the right and duty to administer. In the case of *Munro v. Graham*, above quoted, this was well illustrated. While the Court there sustained the jurisdiction, and was prepared, if necessary, to go on to dispose of the case, and decern against the executor, the action was sisted to abide the issue of an administration suit in the Court of Chancery as the primary and appropriate judicature, if an effectual decree could be obtained there.

"If there had been funds in Scotland carried by the defender's decree-dative, the pursuer's proper course would have been to arrest them *jurisdictionis fundandæ causa*. There are no such funds here now, and the Lord Ordinary greatly doubts whether it can be maintained that there ever were any in Scotland, at or after the date of the defender's decree-dative. A number of Carron Company shares which had belonged to Francis Garbett were confirmed to by an executor-creditor of Garbett, who sold them to Mr Stainton in 1817. The defender, as executor of Garbett, and holding letters of administration in England, took proceedings in Chancery against Stainton, on the ground that the sale had been brought about by his fraud, in which he sought to have the sale set aside, or for other remedy. After these proceedings had commenced, and, apparently, in aid of the defender's title to pursue them, he got himself decerned executor in Scotland. He afterwards compromised the Chancery suit by taking payment from Stainton of the sum of £60,000. The pursuer contends that the

shares must be held to have belonged to the estate at the date of the decree-dative, and that the defender is bound to account for them as Scotch executry. The Lord Ordinary does not think it necessary to determine this point. Possibly, if jurisdiction were once constituted against the defender, it might be ascertained, on a consideration of the merits of the case, that the shares, and the sum for which the defender abandoned his claim in regard to them, constituted Scotch executry, taken up by his title obtained in Scotland, and for which he is therefore bound to account here. But the Lord Ordinary knows of no authority for holding that the mere obligation so to account, if it could be made clear, constitutes a ground of jurisdiction against a party who is in no other way subject to the jurisdiction of the Court. In the only case in which he can find the point to have been considered—*Magistrates of Wick v. Forbes*, 12 D., 299—the opinions of the Judges appear to him to be quite opposed to that view. In that case, two out of five Scotch executors resided in England, and the objection to the jurisdiction was, that no steps had been taken to found jurisdiction against these two in an action directed against the whole five. The Lord Ordinary repelled the defence, and the Court adhered. Lord Fullarton, who dissented from the judgment, said, 'I think it is going too far to hold that if a party confirm in the Scotch Courts, he thereby subjects himself to their jurisdiction in all cases, so that he may be called as a defender without the ordinary process to found jurisdiction.' The Lord Ordinary does not understand that the other Judges dissented from the principle thus announced by Lord Fullarton. The judgment appears to him to have proceeded mainly upon the view that the entire body of executors, who had been acting and litigating in Scotland in that capacity, and the majority of whom were resident here, were liable to be dealt with as a company or legal body. The interlocutor of the Lord Ordinary was adhered to in respect of the special circumstances. No such specialities exist in the present case, and the Lord Ordinary does not think that the jurisdiction can be sustained."

The pursuer reclaimed.

J. M'LAREN for him. (*Erskine*, 10 Clark (H. L. Cases), 1; *Williams' Exrs.*, 1781; and *Westlake Int. Law*, 279, were cited for reclaimer.)

FRASER for respondent, was not called on.

**LORD PRESIDENT**—My Lords, I cannot have any doubt that the Lord Ordinary is right. The pursuer Mr Robson sues in the character of a creditor of a person named Garbett, who died in 1803. His claim is a simple claim of debt. The person against whom the action is directed is Sir John Walsham, who it appears was administrator of the deceased Garbett in England. He is a domiciled Englishman. He has no estate in Scotland, nor any funds there of any kind, and there are none of the ordinary means of founding jurisdiction against him. But it is said that this Court has jurisdiction to entertain this action, because upon 4th February 1863 the commissary of Edinburgh decerned this defender executor-dative *qua* next of kin to the said Francis Garbett, and "assigned next court to give up inventory, make faith and find caution." Nothing followed on that; and the simple question is, whether a foreigner, by reason of this decerniture in his favour by the commissary, is subject to the jurisdiction of this Court, in a suit by a creditor of the party to whom he has thus been decerned

executor-dative. The question is simple and plain. There is no authority to support this jurisdiction, and no ground on principle.

The other Judges concurred

Adhere.

Agents for Pursuer—White-Millar & Robson, S.S.C.

Agents for Defender—Russel & Nicolson, C.S.

Tuesday, November 5.

SCOULAR'S TRUSTEES *v.* SCOULAR AND OTHERS.

*Trust—Residue—Legatee—Next of Kin.* Terms of trust deed under which held that any residue of estate which might remain after satisfying the special purposes of the trust, was not intestate succession, but was divisible proportionately among the legatees named in the deed.

The late James Scoular, engineer, Glasgow, who died in December 1865, executed a holograph testament whereby he appointed A. M. Robertson, R. Macalister, and J. Fraser his sole executors and administrators, with full powers as such; declaring that these parties "shall be accountable to the residuary legatees hereinafter named for their intromission in virtue herein." Certain legacies were appointed to be paid to various benevolent institutions, and various bequests made to different persons. The deed then ran thus:—"If there is as much money left after all the bequests is fully made, I appoint my executors to pay the Government legacy tax on all the legacies, and if any return ever comes from the Western Bank, as I paid all the calls in full, my executors is fully empowered to give in proportional parts to the above mentioned institutions and persons mentioned. And I do hereby expressly exclude all my half brothers and sisters, viz., Alexander Scoular and his heirs, and Andrew Scoular and his heirs, and my half sister Grisel or Grace Scoular, since deceased, and her heirs, and all my other relatives and next of kin from any right or interest in my moveable succession."

Alexander and Andrew Scoular and others, as next of kin of the deceased, now contented, in an action of multiplepounding raised in the name of the trustees, that there was no nomination of residuary legatees in the said testament, nor any disposal by the testator of the residue of his estate, and claimed the whole find *in medio* as intestate succession, falling to the next of kin.

The claim was resisted by the institutions and persons named as legatees, who claimed proportional shares in any residue which remained after satisfying the special purposes of the testament.

The Lord Ordinary (JERVISWOOD) found that the legatees named in the deed were also constituted the residuary legatees of the testator, and repelled the plea of the next of kin.

The next of kin reclaimed.

SCOTT and STRACHAN for reclaimers.

WATSON, LAMOND, W. A. O. PATERSON, and BIRNIE, for respondents, were not called on.

The Court adhered, on the ground that the intention of the testator, as disclosed in the deed, was, that any residue should go to the legatees named; two of their Lordships being of opinion that that intention was very clearly expressed.

Agents for Reclaimers—Macgregor & Barclay, S.S.C.