

chirder, in the county of Banff, and by the terms of the lease bound to personal residence upon the farm. In connection with this the pursuer pleads the terms of the 46th section of the Sheriff Court Act of 1876.

It appears to me that this plea of the pursuer is the only one which raises any difficulty in the case, and it was supported with great ingenuity at the bar. When narrowly examined, however, its insufficiency becomes apparent.

In the first place, mere joint tenancy in a farm, apart from any allegation of carrying on business with a place of business, is clearly not enough. Even joint ownership or sole ownership would not create a Sheriff Court jurisdiction, as I have already observed. Now, if ownership would not do, it would be a strong thing to hold that mere joint tenancy without anything else would be enough.

Then in reference to the provision of the recent Sheriff Court Act, although joint tenancy and joint occupancy of the farm along with the father is averred, it is not said that the father and son carry on business as partners in the county, or have as such any place of business there. It was said this was implied in the averment of joint occupancy of the farm, and that the farmhouse must necessarily be the place of business of all the joint occupants of the farm, however numerous they might be, and although none of them might in point of fact reside there. I cannot assent to this. The farmhouse might be occupied by only one of the joint tenants, or perhaps only by a grieve, and in no sense can a farmhouse be held to be the place of business of all the joint tenants of the farm. And then it is not said that the contract sued on had any relation whatever to the farm business, or that the horse was purchased or hired for the use of the farm, although it is said that it is now employed in farm work. On the contrary, it is expressly averred that the mare was purchased or hired by the defender for his personal use as an individual, and not for the use of the farm or the joint tenants thereof. It appears to me therefore that the provision in the recent statute does not apply. I think that provision is limited to the case where a defender, whether a firm or an individual, carries on business and has a place of business in the county where he personally or as a partner conducts business. Moreover, the second portion of the clause seems specially to refer to cases very frequent in Glasgow and elsewhere, where the place of business is in Lanarkshire and the residence in Renfrew or a neighbouring suburb, which may be and often is in a neighbouring county. I think it has no application to a person residing abroad and merely having an interest in a farm in Scotland. I doubt whether farmers are included in the expression "persons carrying on a trade or business." Farmers were not held to be traders under the old bankrupt law, and they were not subject to mercantile sequestration unless besides being farmers they carried on business as cattle dealers or lime burners or grain merchants. The alleged obligation contained in the lease binding the tenants to personal residence is of no consequence, as it is not pretended that this obligation has been implemented by the defender.

On the whole, therefore, I am of opinion that there are no grounds and no averments sufficient and relevant to found jurisdiction, and therefore the action has been rightly dismissed.

LORD JUSTICE-CLERK—I quite concur, and think it unnecessary to make any further observations.

The Court dismissed the appeal.

Counsel for Pursuer (Appellant)—Keir—Dickson. Agent—George Andrew, S.S.C.

Counsel for Defender (Respondent)—Black. Agents—Curror & Cowper, S.S.C.

. Saturday, November 22.

## SECOND DIVISION.

[Sheriff of Lanarkshire.]

WILSON v. ORR.

*Location—Onus of Proof—Where the thing Hired has been Destroyed—Cause of Loss.*

A horse was lent to a farmer on the footing that its work was to pay for its keep, and it died shortly after from the effects of an injury. Held (1) that the *onus* lay upon the farmer to show the cause of injury, and that in the absence of evidence to another effect he must be held responsible.

Circumstances in which such an *onus* was held not discharged.

Archibald Wilson, postmaster, Glasgow, brought this action against Robert Orr, farmer, Gartferrie Mains, Lanarkshire, for delivery of a horse lent to the latter, or failing delivery for payment of £54 as its value. Orr had agreed to take the horse in question on the footing that its work was to pay for its keep, and that it was to be returned whenever Wilson required it. It was sent to Orr on Friday 20th April 1877, and it died while in his possession on 8th May following from the effects of an injury on the shoulder and a supervening swelling. The defender stated that the death arose from natural causes, and that consequently he was not liable.

He pleaded—(1) The horse having died from natural causes while in the defender's possession, and through no fault of his, he cannot return the horse to the pursuer, nor can he be held liable in its price. (2) The defender having used the horse for the specified purpose agreed on, and having come under no obligation to return it in any special condition, he is not liable for damages nor for the total loss of the subject, the same not having been occasioned by his fault, according to the rule *res perit suo domino*.

The Sheriff-Substitute (GUTHRIE) after proof gave decree for £45, finding that it was the duty of the defender to discharge the *onus* by proving an injury existing when he got the horse, or else pure accident. He added this note to his interlocutor:—

"*Note.*—This is plainly a case of location, in which the rule as to the risk is that the subject lent perishes to the owner provided that the lessee proves that its loss is due to a pure accident or to some cause for which he is not liable—Bell's Com. i. 454; Bell's Pr. 145, and cases of *Robertson v. Ogle*, *Pyper*, and *Pullars* there cited. This is undoubtedly a narrow case for the application of the rule. The defender has brought witnesses to show that ordinary good care was taken of the animal; and the case seems

to turn on the medical evidence as to the injury causing the swelling and gangrene of which the animal died. The balance of that evidence is to the effect that the injury must have been received while the horse was with the defender. Had there been a previous wound or bruise it does not appear to me that the defender would have had much difficulty in proving it. He had the use of his own eyes and skill when he took possession of the horse; and he might have been able to prove it by the grooms of the pursuer, or of Mrs Townsend, who had the horse on hire for some time before he got it. At all events, it was his business to prove it, and he has not done so. On the whole I come to the conclusion that the horse must have got some bruise while the defender had it, and the presumption is, in the absence of evidence to the contrary, that it was caused by ill-usage. It does not seem probable that the horse could have hurt itself in the stable."

The Sheriff (CLARK) adhered in respect of no appearance for the defender.

The defender appealed to the Court of Session, and argued—There was no obligation on him to show the actual cause of injury, which was what the decision of the Sheriff-Substitute came to.

Authorities—*Robertson v. Ogle*, June 23, 1809, F.C.; *Pyper v. Thomson*, Feb. 4, 1843, 5 D. 498; *Smith v. Melvin*, Dec. 9, 1845, 8 D. 264; *Pullars v. Walker*, July 13, 1858, 20 D. 1238; *Moes, Moliere, & Tromp v. Leith & Amsterdam Shipping Coy.*, July 5, 1867, 20 Macph. 988; Bell's Comm. i. 454; Bell's Pr. sec. 145.

At advising—

LOBD JUSTICE-CLERK—This case comes within the category of loan, in which very narrow questions have frequently occurred. The law is sufficiently fixed by a series of authorities, to which the Sheriff-Substitute refers—[reads note *ut supra*].

In the case of *Robertson v. Ogle* (15 F.C. 348) a person hiring a serviceable horse and returning him useless was found liable for his value, and it was held that the proprietor of the horse was not obliged to prove actual maltreatment when out of his possession. It was however stated that this did not affect the ordinary rule *res perit domino*. This case then laid down that although the risk remained with the owner, it fell upon the hirer (1) to prove the cause of the injury, and (2) to adduce at least *prima facie* evidence that all due care was taken. The opinion of Eord Cowan in the case of *Pullars*, 20 D. p. 1245, puts the matter beyond question—"Fortunately the parties are here at one as regards the degree of diligence which applies to this case. It is that degree of diligence which applies to the hirer in the case of a contract of location. I think that a reasonable view. In this case therefore, as in all such cases, the hirer must show the cause of death, and that he is blameless. Now, has this *onus* been fully satisfied? Have the pursuers shown that the cause of death was not one for which they were responsible? They have proved the disease of which the horse died, but they have not shown that for the probable cause of the disease they are not responsible. The principle which ruled the early case of *Binny* (M. 10,079) and the recent case of *Robertson v. Ogle* makes it incumbent on the pursuers to establish satisfactorily

that they are blameless as regards the death. The question in this view is to be determined on the inference to be deduced from the whole circumstances in evidence, and a very little may turn the scale."

I therefore assume that the hirer here was bound (1) to show the cause of injury from which the horse died, and (2) that it was a cause for which he was not responsible. I am of opinion that he has not done so, and I think therefore that upon the hirer must fall the loss, and that the Sheriff was right.

LOBD ORMDALE concurred.

LOBD GIFFORD—This is a difficult case both upon the evidence and upon the legal question as to the *onus* of proof. There is no direct evidence how the horse got the injury on its shoulder—nothing but inference or conjecture—and the question is, who is to bear the loss? On the one hand, it was the property of the pursuer, and unless some blame attaches somewhere the general rule is *res perit domino*. On the other hand, I think it is sufficiently proved that the injury which caused its death must have been received subsequent to the date of its delivery to the defender, and looking to the nature of that injury and its very serious character and extent, I think a heavy *onus* lay upon the defender, its custodian, to show or explain how the injury was sustained, or how it might have been sustained, without any fault on his part or on the part of those for whom he is responsible.

The defender alone was custodian of the animal. It was under his entire control during the day and in his stables at night. It lay upon him or his servants to feed it and to attend to it in every way. The pursuer was not near it, had no charge of it, and had no means of tracing or observing its treatment. In these circumstances I think it lay upon the defender to do a great deal more than merely to say—I cannot tell how the injury was received, but it was not owing to any fault in me or in my servants. The animal may have injured itself in the stable—I cannot tell how—but there are my servants, everyone of whom exonerates himself of blame.

So standing the case, I think that the Sheriffs have taken the right view in holding that the defender in the absence of other evidence must be held responsible. He has not sufficiently discharged himself of the duty and *onus* which lay upon him, and which lies upon all parties who under a contract of hiring or of any other kind get the entire use, custody, and control of another person's property. If the property is found broken or destroyed, the custodian cannot content himself without explanation by a mere plea that he was not to blame.

If a conjecture is to be hazarded, I think that of the pursuer's counsel is as likely as any—that the animal got loose in the defender's stable on the Saturday before its death; that sometime on the Saturday night it had been kicked on the shoulder by some of the other horses in the stable; and that it was found so injured, as the defender himself tells us, at 4 o'clock on Sunday morning; he then saw the shoulder-swelled. But if this happened, there must have been fault on the part of the defender or his servants as to the tying up of the horses, and the evidence

is a blank as to this. It is remarkable that the defender himself does not say that he found the horses, including this one, all properly tied up when he went in at 4 o'clock on the Sunday morning. I should have liked to know what took him to the stable so early long before it was light.

On the whole I am satisfied with the judgment of the Sheriffs.

The Court adhered.

Counsel for Pursuer (Respondent)—Guthrie Smith. Agent—J. Gill, Solicitor.

Counsel for Defender (Appellant)—Goudie. Agent—R. Starke, Solicitor.

Saturday, November 22.

## SECOND DIVISION.

SPECIAL CASE—DUNSMURE AND OTHERS  
(DUNSMURE'S TRUSTEES) *v.* ELLIOT OR  
DUNSMURE.

*Succession—Meaning of "Money" in Testamentary Writing.*

Held that the word "money" in a testamentary writing falls to be construed as the circumstances of the case require, the Court for that purpose being placed in the position occupied by the testator, and that it may be applied either in its strict acceptation to coined money or bank notes, or to the whole moveable estate of the deceased.

Circumstances where the term "money" in a testamentary writ was held to apply to the universal succession of the testator.

*Writ—Meaning of Term "Will."*

Circumstances where the term "any other will" was held to cover a marriage-contract.

By antenuptial contract of marriage between Major George Dunsmure and his wife, dated 17th and 18th March 1846, Major Dunsmure made over to trustees £2000 in trust for the conjunct liferent use of the spouses and the survivor, the principal, interest, and proceeds thereof after the death of the survivor to be made over to the child or children of the marriage in such shares as the spouses or the survivor of them should appoint by any writing or writings under their hand, and failing direction, equally, share and share alike, under the declaration that if any of the children should die before the shares falling to them should become payable, leaving lawful issue, then such issue should have right to the share of the parent predeceasing, and in case there should be no children, or if there should be children and they should have all died before the term of payment of their shares without leaving issue, then and in either of these events it was to be competent to Major Dunsmure to dispose of the same by will. There was also an obligation by Major Dunsmure to provide and secure at the first term of Whitsunday after his death the further sum of £2000, the free yearly proceeds thereof to be paid to Mrs Dunsmure during her life, and after her decease to the child or children of the marriage, in such proportions and under such conditions as the spouses or the survivor should have appointed in manner therein mentioned, and

failing any such appointment, then among the children equally, under declarations similar to those made with reference to the other £2000. On the other part, Mrs Dunsmure made over to the trustees certain funds which then belonged to her, and also her share of certain funds and property to which she was entitled under her father's deed of settlement, and also funds to which she might succeed upon the decease of her mother, that the trustees might pay the free yearly income to the spouses during their joint lives, and to the survivor afterwards, and after the death of the survivor the funds and property were to be assigned to the child or children of the marriage under powers and rights to the spouses similar to those conferred in the case of Major Dunsmure's funds.

In January 1869 Major and Mrs Dunsmure executed a deed of division and settlement appointing the marriage-contract trust funds to be divided equally among their children George, Elizabeth, and James.

Major Dunsmure died on 24th September 1873 leaving a trust-disposition and settlement dated 6th September previously, whereby he gave to trustees his whole heritable and moveable estate, for the following purposes, *inter alia*—“(1) To pay the free annual income of the truster's estate after payment of debts and implementing his marriage contract obligations to his wife during her life. (2) To settle on his daughter, in the event of her marriage during the lifetime of her mother, the sum of £1000, paying her at the same time £300 for marriage outfit. (3) In the event of his daughter not being married during her mother's life, to pay her a legacy of £1000 on her mother's death, over and above her share of residue. (4) To pay a similar legacy of £1000 upon Mrs Dunsmure's death to each of his two sons; and (5) to divide the residue of the trust estate upon Mrs Dunsmure's death among his three children equally, it being declared that said shares of residue should vest at the truster's death.”

Lieutenant George Dunsmure, the eldest son, died on 23d June 1878, having shortly before attained majority. He was married and left a holograph testamentary writing in these terms:—

“I, George Dunsmure, give and bequeath to my wife Beatrice Mary Dunsmure all moneys and goods in my possession at the time of my death. Also any money I am entitled to by my late father's will, or any other will, whether she remain my widow or not.

“Subscribed as under,

“G. DUNSMURE, Lt. 36th Ft.

“Emily Sainsbury, } witnesses.  
“Jane Trotter, }

“Signed at Pembroke Dock this 13th day of June 1878.”

The whole trust funds under the marriage-contract were in the hands of the trustees. They consisted of (1) the sum of £5368 invested in various securities, and (2) dwelling-house in Coates Crescent, Edinburgh. The funds settled by Major Dunsmure under his trust-disposition and settlement amounted to about £3700, and were held by his testamentary trustees.

Lieutenant Dunsmure's widow claimed to be entitled, subject to the liferent of Mrs Dunsmure, widow of Major Dunsmure, not only to the legacy and share of residue bequeathed to the deceased by his father's settlement, but also to the share