

claim for damages as a condition of getting an order on the defender to pay what the defender admitted to be due, I think there is no ground for holding that he did. The case having been brought before him, Mr Justice Hawkins, thinking it would be ridiculous to send the case to the Scotch Courts about what was admitted, said to the pursuer—"If you will confine your claim to that, you shall have decree for it. With respect to what is not admitted, it will be more convenient to have the case tried elsewhere." With both affidavits before him he was satisfied that the case, so far as disputed, ought to be tried in Scotland. The claim accordingly was confined to the admitted sum, but with no more effect than if it had been so limited at the beginning. I think there is no ground for holding that the claim which the Lord Ordinary thinks is well founded on its merits was waived and abandoned, or that the pursuer is barred. I should gladly have come to a different result, for I do not like this kind of action—an action by a mere gambler for differences against his broker—and as little do I like the statements in his affidavit, which I consider to be deliberate and wilful falsehoods.

LOED CRAIGHILL concurred.

The Court recalled the interlocutor of the Lord Ordinary, and gave decree in terms of the conclusions of the summons.

Counsel for Pursuer—D. F. Kinnear, Q. C.—H. Johnston. Agents—Mackenzie & Kermack, W. S.

Counsel for Defender—Lord Advocate (Balfour, Q. C.)—Lang. Agents—Paterson, Cameron, & Co., S. S. C.

Friday, December 2.

FIRST DIVISION.

PETITION—RAINHAM AND ANOTHER.

Jurisdiction — Presumption of Life Limitation (Scotland) Act 1881 (44 and 45 Vict. cap. 47).

The Presumption of Life Limitation (Scotland) Act 1881 makes provision regarding the succession to the heritable or moveable estate of "any person who has been absent from Scotland, or who has disappeared for" various periods of years therein specified. *Held* that the statute did not apply in the case of the disappearance of a person who had never been in Scotland, and whose only connection with that country was through an aunt who had married a Scotchman, and to whose heritable estate in Scotland it was averred that the absentee had succeeded.

By mutual disposition and settlement, dated 11th September 1847, executed by David Edmiston, gamekeeper, Newburgh, Fifeshire, and Mrs Frances Rainham or Edmiston, his wife, David Edmiston, *inter alia*, conveyed to his wife, in case she should survive him, and to her heirs, executors, and assignees whomsoever, all and sundry his heritable and moveable estate, of whatever nature or denomination the same might be, which should belong or be addebted to him at the time of his decease. By codicil to this mutual

disposition and settlement, dated 27th May 1865, the spouses, still further to regulate the succession to their respective means and estate in the event of the survivor of them failing to execute any other conveyance thereof, left and bequeathed their means and estate, so far as the same might be extant and belonging to the survivor of them at the time of his or her death, but only in that event, to William Rainham, engineer in Glasgow, brother of Mrs Edmiston.

David Edmiston died without issue on the 19th December 1872, survived by his wife, who under the above mutual settlement succeeded to her husband's whole means and estate, and, *inter alia*, to certain heritable subjects in Newburgh. She did not again marry, and died without issue on 13th June 1873; she did not make up any title to the heritable property left by her husband, or leave any settlement or *mortis causa* writing other than the mutual disposition and settlement and codicil above mentioned. William Rainham, to whom this property was destined by the codicil, predeceased both the spouses, leaving two children, Rose Ann Rainham and William J. Rainham, presently in India; but there being no destination to heirs, and the trustees not being *in loco parentis* to William Rainham, the property fell to the heir-at-law of Mrs Edmiston. William Rainham was her elder brother. She had likewise two sisters who survived her, viz., Mrs Grace Rainham or Sparks, wife of Edmund Sparks, of Longton, Staffordshire Potteries, and Anne Maria Rainham; and she had also an immediate younger brother, Timothy Rainham, who (as the present petition averred) "has disappeared for a period of eighteen years, and has not been heard of from that time. The last time he was heard of was in the month of April 1863, when he wrote a letter to his sister, the said Mrs Grace Rainham or Sparks. At that time he was following the occupation of a house-painter under an assumed name in London, but it was stated by him in the said letter that he would not be there long, and it is supposed that he went abroad."

By section 1 of the Presumption of Life Limitation (Scotland) Act 1881 it is enacted that "In the case of any person who has been absent from Scotland, or who has disappeared for a period of seven years or upwards, and who has not been heard of for seven years, and who at the time of his leaving or disappearance was possessed of or entitled to heritable or moveable estate in Scotland, or who has become entitled to such estate in Scotland, it shall be competent to any person entitled to succeed to an absent person in such estate to present a petition to the Court setting forth the said facts; and after proof of the said facts, and of the petitioner's being entitled as aforesaid, after such procedure and inquiry by advertisement or otherwise as the Court may direct, the Court may grant authority to the petitioner to uplift and enjoy the yearly income of the heritable or moveable estate of such absent person, as the case may be, and to grant all requisite discharges for the same, as if the said absent person were dead; or the Court may sequestrate the estate, and appoint a judicial factor thereon, with the usual powers, and with authority to pay over the free yearly income of the estate to the petitioner, whose discharge shall be as valid and effectual as if granted by the absent person."

The present case was a petition by William J. Rainham, and William Dunlop, his attorney, founding on the foregoing provision. The petition stated that "since the time of his disappearance, as aforesaid, the said Timothy Rainham has become entitled to the foresaid heritable estate, as the immediate younger brother and heir-at-law of the said Mrs Frances Rainham or Edmiston, and the petitioner William J. Rainham, as the only son of the said deceased William Rainham, who was the only brother of the said Timothy Rainham, is the heir-at-law of the latter, and the person entitled to succeed him in the said estate."

The petition further stated that in 1874 Alexander Laing, banker, Newburgh, had been appointed factor *loco absentis* to Timothy Rainham, and that according to the last account rendered by Mr Laing there was a balance in his hands amounting to upwards of £103.

In these circumstances the petitioners prayed for intimation and also for service on Laing; "And thereafter, on resuming consideration hereof, and after proof of the facts above set forth, and of the petitioner the said William J. Rainham being entitled as aforesaid, and after such procedure and inquiry by advertisement or otherwise as your Lordships may direct, to grant authority to the said petitioner to uplift and enjoy the yearly income of the said heritable properties, including the foresaid balance thereof in the hands of the said Alexander Laing, and, either by himself or any factor or attorney duly appointed by him, to grant all requisite discharges for the same, as if the said Timothy Rainham were dead; or to do further," &c.

Laing lodged answers, in which he stated—"It does not appear from the petition that the said Timothy Rainham was a Scotchman, or was ever in Scotland. The respondent believes and avers that he was an Englishman, and was never in Scotland, and submits that in these circumstances, he is not a person 'absent from Scotland' in the sense of the Presumption of Life Limitation (Scotland) Act 1881, and therefore that the said Act does not apply to the present case."

The respondent further founded on the 8th section of the Act, which provided that "for the purposes of this Act, in all cases where a person has left Scotland, or has disappeared, and where no presumption arises from the facts that he died at any definite date, he shall be presumed to have died on the day which will complete a period of seven years from the time of his last being heard of at or after such leaving or disappearance." With reference to this provision the respondent stated that he "has had no communication with Timothy Rainham, and is not aware whether he was heard of after the date stated in the petition, viz., April 1863; but assuming that statement to be correct, then on 13th June 1873, when Mrs Frances Rainham or Edmiston died, Timothy Rainham must, under the section of the foresaid statute above quoted, if it should be held by your Lordships that said statute applies to the present case, be presumed to have predeceased. The succession to the estate in question would therefore open as at that date to the petitioner William J. Rainham, as the only son of Mrs Edmiston's only other brother, and the present petition is in that view incompetent."

Argued for the petitioner—The petition was

competent. There was nothing in the statute to limit it to persons who had once been in Scotland. The Act referred to persons who had "disappeared." That was general, and in contrast to persons who had been "absent from Scotland." As to section 8, that could not be said to be one of the purposes of the Act which would render it inoperative. The Act must receive a construction so as to admit of its obvious intention being carried out. At any rate, the petitioner W. J. Rainham was entitled to succeed if it were held that Timothy Rainham died seven years after his disappearance, and if the Court would make a declaration that Timothy had died, then W. J. Rainham could produce that with his petition for service as heir to Mrs Edmiston—otherwise the Sheriff must presume Timothy Rainham to be alive.

Argued for the respondent—The Act was intended to affect only persons who had once been in Scotland. It throughout referred to "the case of any person who has been absent from Scotland or who has disappeared," and by disappearing it was intended to include cases of persons once in Scotland who had disappeared without it being known whether they had left Scotland or not. On the other question, the only possible construction of section 8 had the effect of making the petition incompetent. Timothy Rainham must, for the purposes of the Act, be held to have died seven years after he disappeared, and consequently he could not have succeeded to the present estate. The petitioner's proposal about service was certainly not one of the purposes of the Act, and besides would affect the fee, not merely the income of the estate.

The Lords made *avizandum* with the case.

At advising—

LORD PRESIDENT—The petitioner in this case, William J. Rainham, is an Englishman residing in India, and it does not appear that he has any connection with Scotland, or ever was in this country in his life. His aunt, however, was married to a Scotch gamekeeper, David Edmiston, and she became entitled to a certain small heritable property in Scotland by virtue of the mutual settlement between her and her husband. By that settlement it was agreed that in the event of the survivor of the spouses failing to execute any further conveyance of that property it should go on the death of the survivor to William Rainham, Mrs Edmiston's elder brother. William Rainham predeceased both spouses, and the conveyance of the property having been to him individually, without mention of heirs, it is assumed in the petition that the property on the death of Mrs Edmiston descended, according to the Scotch law of heritable succession, to her younger brother Timothy. The question whether it did so descend is not before the Court, at least at the present stage of the case, and therefore I assume that the petitioner is right in saying so. Now, in regard to Timothy Rainham we have this averment in the petition. It is said that "he has disappeared for a period of eighteen years, and has not been heard of for that time. The last time he was heard of was in the month of April 1863, when he wrote a letter to his sister, the said Mrs Grace Rainham or Sparks. At that time he was following the occupation of a house-painter under an assumed name in London, but it was

stated by him in the said letter that he would not be there long, and it is supposed that he went abroad." Now, it is to be observed that there is no allegation here that Timothy Rainham ever was in Scotland, or that he ever had any connection with it, except the circumstance that his sister was married to a Scotch gamekeeper. It is not said from what place he disappeared, but it may be assumed that it was from London, as it was there he was last heard of. The state of the facts, therefore, is that the person to whose property the petitioner desires to make up titles was not a Scotchman, had no connection with Scotland, and never was in Scotland so far as appears; and the question comes to be, whether in such circumstances the case is within the provisions of the statute of 1881, entitled An Act to Amend the Law as regards the Presumption of Life in Persons long absent from Scotland?

Now, so far as the title of this statute is concerned, it would appear that long absence from Scotland is the condition in which the person must be regarding the presumption of whose continued life the Court is to make inquiry; and the preamble is in this form—"Whereas great hardships have arisen from the want of any limitation to the presumption of life as regards persons who have been absent from Scotland, or have disappeared for long periods of years, and it is desirable that a limitation should be provided." In the enacting clauses we have similar words; thus, in the first section—the section relied on here—we find the words, "In the case of any person who has been absent from Scotland, or who has disappeared for a period of seven years or upwards." Now, it is contended that the alternative "or who has disappeared" justifies an application like the present; that it does not matter who the person is who has disappeared, or what country he belonged to, or where he has disappeared from, or even that he never has been in Scotland in his life, and that if only it is made out that he has disappeared, and has not been heard of for a given time, then the case comes within the meaning of this clause of the Act. This seems to me a very extraordinary construction to put on an Act of Parliament which was confined in its operation to Scotland. It appears to me that the more reasonable and obvious construction is that to come within the operation of the Act the case must be that of a person who has been in Scotland once, and who has either been absent from Scotland seven years, or has disappeared—that is to say, the alternative is that the petitioner must prove that the person whose succession is in question has been absent from Scotland for the period mentioned in the statute, or if it cannot be proved that he ever left Scotland, that he has disappeared and has not since been heard of. On the second alternative, he may have been in Scotland all the time, but if it can be proved that he has disappeared for the requisite number of years the case will still be within the Act. But to apply the Act to a foreigner who had never been in Scotland, and had no connection with it, would be a strained and unnatural construction. And it is the more necessary to be cautious in considering this statute, because though in the present case we are dealing with heritable property the local situation of which was in Scotland, and over which we presumably have jurisdiction, and although

the parties interested may be domiciled in another country and have no connection with Scotland, yet the very same words are used later on in the section of the Act relating to moveables. It is there provided that "In the case of any person who has been absent from Scotland, or who has disappeared for a period of fourteen years or upwards, and who has not been heard of for fourteen years, and who at the time of his leaving or disappearance was possessed of or entitled to moveable estate in Scotland, or who has since become entitled to moveable estate there," then after certain procedure the Court may "grant authority to the petitioner" (the person entitled to succeed to the absent person in such moveable estate) "to make up a title to, receive and discharge, possess and enjoy, sell or dispose of the said moveable estate, in the same manner as if the said absent person were dead." Now, the person may have disappeared from anywhere—from Paris or Constantinople, for instance—and in that case are we to adjudge that his next-of-kin are to take up his moveable estate over which we have jurisdiction on no ground except that their predecessor has disappeared in a foreign country and has not since been heard of? The site of moveables does not generally give jurisdiction, for moveables have no site, and to apply any other doctrine to this statute might give rise to embarrassments of which it is not easy to see the end. But while that consideration as regards moveables should make us very cautious in dealing with this statute, I cannot say that I have any doubt, taking into account the case of heritage alone. The case, as stated in the petition, does not appear to me to be within either the mischief or the meaning of the Act. The mischief to be remedied is the case of a person who has been in Scotland, who has disappeared from it or within it for a certain length of time, and who was at the time of his disappearance, or has since become, entitled to property in Scotland; and the meaning of the statute is exactly commensurate with the mischief to be remedied. That is to say, it comprehends only the case of one who has been absent from Scotland for a long period, or who has disappeared for that period, although it may be doubtful whether he is in or out of Scotland. On these grounds I think we ought to dismiss this petition.

LORD MURE—I concur, and have little to add. The case is a mere question on the construction of the statute. It appears to me that the statute is for the benefit of persons belonging to Scotland, and I do not think that a petition at the instance of a person who has never been in Scotland, laying claim to the property of a person who was never in Scotland, can be said to be within its purview.

LORD SHAND—The Court has seen enough of this statute to be aware that it is so framed as to leave several important and difficult questions to be decided, but with regard to the question with which your Lordships have dealt I have no difficulty in concurring. On this point I think the meaning of the statute is plain. The absent person here confessedly never had any tie to Scotland, and never, so far as we can see, was there. Yet we are asked to apply a Scotch statute to the effect of holding that the presumption is

that he died seven years after he was last heard of. The person referred to in the petition was an Englishman, but if the petition were sustained as regards him it would equally have to be sustained in the case of an American or any other foreigner. I do not think the statute either in its spirit or its letter relates to such cases. The title is "An Act to Amend the Law as regards the Presumption of Life in Persons long absent from Scotland;" and I need not say that the words "long absent" could not reasonably be used if the person who has disappeared has never been present in Scotland. The words imply a tie to Scotland, and a previous residence in Scotland. The enacting clause contains an alternative, and provides for the case of a person who has been "absent from Scotland, or who has disappeared for a period of seven years or upwards." But here again I cannot doubt that just as the absence must be the absence of a person who once had a residence in Scotland, so the disappearance must be disappearance of a person who was at one time known to live in Scotland. I am therefore clearly of opinion that the statute does not apply to foreigners who have never been in Scotland.

The Lords refused the petition.

Counsel for Petitioner—J. Campbell Smith.
Agent—Alex. Gordon, S.S.C.

Counsel for Respondent—Orr. Agents—Boyd,
Macdonald, & Co., S.S.C.

Friday, December 2.

FIRST DIVISION.

RONALDSON AND OTHERS (GRAY'S TRUSTEES) v. BENHAR COAL COMPANY AND SMITH AND ANOTHER (ITS LIQUIDATORS).

Public Company—Winding-Up—Transference of Rights and Liabilities to Liquidator—Lease—Assignment—Right of Relief.

A coalmaster conveyed to a public company his right to two leases by the same landlord, but for different terms, which related respectively to an upper and an under seam in the same coalfield. Both these leases contained a clause excluding sub-tenants and assignees, except on condition that the tenant, his heirs and successors, should remain liable for the rent and other prestations in the lease. The company went into liquidation under supervision, and the liquidators were authorised by the Court to continue its business and to dispose of it as a going concern. In virtue of this authority they continued to work the upper of the two seams in question, which had been worked by the company before it went into liquidation, but they did not touch the lower, which had never been opened. The original tenant having been called on by the landlord to pay the rent due for the lower seam, sought relief from the liquidators for the full amount, in so far as it had accrued after the commencement of the liquidation. *Held* that he was not entitled to be relieved to the full amount of the

rent, but merely to share in the assets *pro rata* along with the other unsecured creditors of the company.

Observations (*per* Lord Mure and Lord Shand) on the difference between the position of the trustee on a sequestrated estate and the liquidator of a public company in regard to the vesting of the bankrupt estate in each respectively.

The late George Gray of Leavenseat, by an assignation dated 6th August 1872, assigned the following subjects to the Benhar Coal Company (Limited), viz:—1. All and whole the tenant's right in a lease dated 9th January 1867, entered into between the Hon. Sir George Deas, Knight, one of the Senators of the College of Justice, on the one part, and Gray on the other part, of that seam of coal called the Benhar Coal Seam in the lands of Hartwoodhill, for the period of nineteen years from and after Martinmas 1864, with power to put an end to the lease at any term of Whitsunday or Martinmas on giving three years' notice, or paying three years' additional fixed rent, but on no other footing or pretence whatever unless the coal should be sooner wholly wrought out and exhausted. The fixed yearly rent of this lease was £300, payable half-yearly, or, in the option of the landlord, certain royalties in lieu thereof. 2. All and whole the tenant's right in certain missives of lease entered into between Sir George Deas and Gray, dated 18th and 20th July 1870, of the seams of common coal and smithy or blind coal in the same lands of Hartwoodhill, and situated underneath the Benhar Seam, for the period of eighteen years from and after Whitsunday 1870, with power to put an end to the lease at any term of Whitsunday or Martinmas on giving three years' notice, or paying three years' additional fixed rent, but on no other footing or pretence whatever unless the coal shall be sooner wholly wrought out and exhausted. The fixed yearly rent was £150, payable half-yearly, or, in the option of the landlord, certain royalties in lieu thereof. The Benhar Company and Mr Gray's trustees on 4th and 5th November 1879 gave notice to terminate this lease as at the term of Martinmas 1882.

Each of these leases contained a provision expressly excluding assignees and sub-tenants, except on the condition of Gray, his heirs and successors, remaining liable for the rents and prestations and implement of all the stipulations in the leases, on which footing he or they might assign or sublet, but not otherwise.

In addition to the two leases by Lord Deas, the assignation conveyed to the Benhar Company Gray's rights under seven other leases by different landlords, and for various periods of endurance. The assignation further contained a declaration that the company should pay all liabilities and implement all obligations exigible in respect of the various leases subsequent to 1st July 1872, Gray and his heirs and successors paying all such liabilities and implementing all such obligations prior to that date.

On December 30, 1880, it was resolved to wind up the Benhar Company voluntarily, and J. T. Smith, C.A., Edinburgh, and A. W. Turnbull were appointed liquidators. Thereafter, on January 18, 1881, a supervision order was pronounced by the First Division of the Court.

In this liquidation Mr Gray's trustees presented