

was necessary to raise them up to the character of debts by some element of onerosity in the cause of granting.

In the case of *Glen*, however, we were, I think, of opinion that the ratification granted by the apparent heir was an obligation under which he could have been compelled at any time to communicate to the widow all the powers which he had to give effect to the substance of the right ratified, and so became at once a debtor to that effect. This is a much clearer instance of the same kind. The conveyance here was not only delivered, but became immediately operative. It contains an obligation on the part of the granter to make up his titles when required, and against such a demand he would have had no defence. It would have been no answer on his part to allege that he was not legally bound to undertake such an obligation; it was enough that for reasons he thought sufficient he had undertaken it. He was a debtor for implement, and the grantees were his creditors, and in case of his refusal the latter could have done ultimate diligence against him. It was a debt as well as a deed of the heir-apparent, and very clearly, as I think, within the statute.

I would refer in conclusion to two authorities which seem to have some bearing on the last view which I have mentioned. I do not find that the case of a deed purely gratuitous, but becoming operative during the lifetime of the heir-apparent, has ever occurred for decision. In the case of *Graham v. The Countess of Glencairn*, M. Heir-Apparent, App. 1, which related to a liferent locality granted to a widow by an heir of entail possessing on apparenry, it was pleaded that the Statute 1695, c. 24, made no provision in regard to the onerosity of the deeds to which it applied. The Court applied the statute, and the report bears that it was observed on the Bench—"The Act 1695, c. 24, transmits the obligation of the interjected heir against his successor, in the same manner as if his titles had been completed. It protects his onerous and rational debts and deeds; and there is no occasion at present to consider its effect as to those which are gratuitous, because a widow's provision is clearly onerous." The case was affirmed on appeal, and in Paton's Appeals, vol. v., will be found Lord President Campbell's note in the case, which is worth consulting. Thirty years afterwards, in the case of *Kennedy*, 7 S. 400, Lord Glenlee said—"As to the other matter, I own, from what I recollect of the case of *Graham*, I considered that the effect of an heir passing by his ancestor who had possessed on apparenry was to subject the heir passing by in the same sort of debts which, if the heir-apparent had been entered, would have been effectual against the succeeding heir."

If this definition be sound, it is conclusive of such a case as the present.

The Lords answered the first question in the affirmative, and the second in the negative.

Counsel for First Parties—Begg. Agent—W. & J. Burness, W.S.

Counsel for Second Parties—Gillespie. Agent—G. M. Thomson, W.S.

Saturday, July 1.

FIRST DIVISION.

[Lord Lee, Ordinary.]

MACKIRDYS v. KEITH AND ANOTHER.

Foreign—Jurisdiction—Executor—Confirmation—Domiciled Foreigner—Executor on Scots Estate.

A Scotswoman was decerned executrix-nominate on a Scots estate; thereafter she married an Englishman, and went to reside with her husband in England. Being sued to account as executrix in the Court of Session, she alleged that the estate had been divided, and pleaded that the Scots Courts had no jurisdiction. *Held* that if she was still administering the estate the Court of Session had jurisdiction.

Opinions that even if the administration had been completed, an action of accounting was properly brought in the Courts of Scotland.

This was an action raised by Granville de Montmorency Mackirdy and Henry Whitehead Mackirdy against Mrs Mary Wright Vale or Keith, "wife of the Rev. Charles M'Gee Keith, Fuscombe Vicarage, Twyford, Berkshire, as executrix-nominate of the deceased Mrs Agnes Wright or Howie, sometime residing at Seamill, in the parish of West Kilbride, widow," and also against Miss Margaret Vale, residing in Brighton. The conclusions of the summons as laid against the former defender were to have her as executrix decerned to account and reckon with the pursuers for her intromissions with Mrs Howie's estate, and for payment to them of a balance said to be due them on such accounting, or failing an accounting, for payment of £1900. In the event of its being found that payment of part of the estate had been made to the other defender Miss Vale, the pursuers sought to have her decerned to repay such part of the estate either to them or to Mrs Keith as executrix, that it might be accounted for in this action.

From the averments of the pursuers and the admissions of the defenders it appeared that Mrs Howie died on 17th January 1878 at Largs Castle, Ayrshire. She left a settlement dated in July 1877, by which she nominated as her executrix the defender Mrs Keith, and directed that the residue of her estate should be divided between her and the other defender Miss Maggie Vale. At that time Mrs Keith was still unmarried, and domiciled and resident in Scotland. She was duly confirmed executrix-nominate to Mrs Howie. The pursuers' averment on this head was as follows:—" (Cond. 6) On Mrs Howie's death the defender Mrs Keith entered into possession of her whole estate, and gave up an inventory of her personal estate, which is recorded in the Commissary Court Books of Ayrshire on 16th March 1878. She also expedite confirmation as executrix-nominate of Mrs Howie, conform to testament-testamentar by the Sheriff of Ayr in her favour, dated 30th March 1878, and she is now in course of administering the estate."

The defenders denied that Mrs Keith was administering the estate at the time the action was brought, and averred in their statement of facts "that the whole estate has, with the con-

sent and acquiescence of all parties, been *bona fide* divided and consumed on the faith of the said deed (Mrs Howie's will of July 1877), as the last will and testament of Mrs Howie, and no part of the estate now remains with Miss Keith as executrix."

The pursuers alleged that by a subsequent writing of September 1877 Mrs Howie had made them her residuary legatees, and that the bequest of residue of July 1877 had been thus revoked. This the defenders denied, and alleged that the pretended writing of September 1877 was vitiated in *essentialibus*, and, moreover, that it had been fraudulently impetrated from Mrs Howie.

The present question turned, however, on the following statement and pleas for Mrs Keith. She averred (Stat. 8)—"Mrs Keith resides with her husband in Berkshire, she has no domicile in Scotland, and is not subject to the jurisdiction of the Scottish Courts."

Miss Vale was possessed of heritable property in Scotland.

The defenders pleaded, *inter alia*—" (1) No jurisdiction. (2) The pursuers' statements are irrelevant. (4) The defender Miss Keith having now no funds in her hands as executrix, she should be assoilzied. (5) The whole estate having been *bona fide* paid away and consumed, the defenders should be assoilzied."

The Lord Ordinary (LEE) repelled the plea of no jurisdiction and ordered issues to be lodged for the trial of the cause.

He added this note:—"The question on the merits raised by this action is, whether the pursuers are interested as residuary legatees in the succession of the late Mrs Howie? She died domiciled in Scotland, and the defender Mrs Keith obtained confirmation in the proper Court in Scotland as executrix-nominate under the will set forth in the condescendence. It is not disputed that upon this title Mrs Keith realised the whole estate of Mrs Howie, but it is said that the estate has been *bona fide* paid away or consumed, and it is pleaded that the Courts of Scotland have no jurisdiction in the cause, because Mrs Keith is resident and domiciled in England, and jurisdiction has not been founded by arrestment.

"I cannot assume at this stage that Mrs Howie's estate has been all paid away and consumed, and I think that the executrix, as administering a Scots estate under a Scots title, is liable to the jurisdiction of this Court—a cause relating to the rights of succession under Mrs Howie's testamentary writings and to the proper distribution of the estate.

"The judgment of the House of Lords in the case of *Lady Baird Preston* (11 Rob. 88) appears to me to support the jurisdiction, and I think that the decision in *Robson v. Walshaw* (6 Macph. 4) is inapplicable. The defender in that case had not made use of his title, and the estate was part of the estate of an Englishman.

"I therefore repel the plea."

The defenders reclaimed, and argued—Where defender is domiciled in a foreign country, and no arrestments to found jurisdiction have been used, the Courts of Scotland have no jurisdiction. Mere confirmation as executor to a Scots estate does not confer jurisdiction on the Scottish Courts, because a mere obligation to account is not a ground of jurisdiction. Lord Fullerton said in *Magistrates of Wick v. Forbes*, 12 D. 229—"I

think it is going too far to hold that if a party confirm in the Scottish 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 case of *Lady Baird Preston*, founded on by the Lord Ordinary, in which the Lord Chancellor says "The domicile regulates the right of succession, but the administration must be in the county in which possession is taken and held, under lawful authority, of the property of the deceased," did not apply; that was a question of administration, not a question of jurisdiction. The case of *Robson* was quite in point, for the difference between that case and the present, to which the Lord Ordinary referred, did not affect the judgment.

The pursuers were not called on.

At advising—

LORD PRESIDENT—This is an action against Miss Keith, "wife of the Rev. Charles M'Ghee Keith, Buscombe Vicarage, Twyford, Berkshire, executrix-nominate of Mrs Agnes Wright or Howie, sometime residing at Seamill, in the parish of West Kilbride, widow, conform to testament testamentary by the Sheriff of Ayrshire in her favour dated 3d March 1878." An objection is made to the jurisdiction of this Court to make Mrs Keith as executrix accountable for the executry estate. The averment on which the pursuer relies so far as concerns this question is contained in Condescendence 6—[*His Lordship here read Condescendence 6, quoted supra*]. The answer made to that statement by the defender is—"Denied that Mrs Keith is now administering the estate. *Quoad ultra* admitted. Reference is made to the defenders' statements;" and on referring to Statement 15 for the defenders we find it stated—"The whole estate has, with the consent and acquiescence of the whole parties, been *bona fide* divided and consumed on the faith of the said deed, as the last will and testament of Mrs Howie, and no part of the estate now remains with Mrs Keith as executrix." The parties are thus at issue on this important question of fact, whether this estate is still in course of administration and is not yet wound-up, or whether with consent of all parties interested it has been divided. Until that matter of fact is cleared up, it would be, in my opinion, unsafe to say whether there is jurisdiction or not. If the estate is still being administered, I have not the smallest doubt that this Court has jurisdiction, though the defender who is a Scotswoman, and at the time of being confirmed executrix was domiciled in Scotland, is now the wife of an Englishman, and is resident and domiciled in England. The clearing up of this matter of fact will determine not merely the question of jurisdiction, but the whole merits of the case also. If the defender is right on that matter of fact, she is entitled to be assoilzied; if not, I am clearly of opinion that this Court has jurisdiction. I am therefore for sustaining the jurisdiction on the plain ground that this is a Scots administration, and that the country of the administration is that where the executor not only is liable to be sued, but the country where he ought to be sued.

Whether, if it turn out that the estate has all been paid away, the question of accountability for the past administration ought to be tried in

this Court is a matter on which it is unnecessary to give any opinion, but I may say that I think it quite possible that even in that case the jurisdiction would be sustained. That, however, is not a point requiring to be determined here. I am for adhering to the interlocutor of the Lord Ordinary.

LORD DEAS—I have not the smallest doubt that the defender being confirmed executor of the estates of the late Mrs Howie, which is a Scots estate, is subject to the jurisdiction of the Courts of Scotland in an action connected therewith, so long as the estate is not yet wound up. The case of *Lady Baird Preston* affirmed the principle that where the administration is there the person who administers is answerable. That is a sound general proposition.

LORD MURE concurred.

LORD SHAND—If an estate is under the charge of a Scots executor, and has been administered under a Scots confirmation, I am of opinion the executor may be called on at any time to account for it in Scotland. The administration is in this country, and is subject to the Courts and according to the law of this country affecting executors, and therefore though the administrator may go abroad during the course of the administration, I hold that he continues subject to the jurisdiction of this Court in respect of his administration. The executor takes the benefit of a Scots decree of confirmation, and it appears to me to follow he is answerable in the Courts of this country for an accounting in reference to the executory estate. If the *dictum* of Lord Fullerton which was referred to is to be regarded as an authority to the contrary, I must, with deference to his Lordship's view, express my dissent from it. The case of *Robson v. Walshaw* was a very special case indeed. It is clear that the defender in that case was acting under English letters of administration, and that his decreedative as a Scots executor was merely ancillary to the decree of administration which he had obtained in England. That case, therefore, does not affect the more general question raised here. The *dictum* of the Lord Chancellor in the case of *Lady Baird Preston* is an authority which bears out the view which I have expressed, but which I should have adopted even though such authority for it had not existed.

The Lords adhered.

Counsel for Pursuers—Mackintosh—Pearson.
Agents—Mill & Bonar, W.S.

Counsel for Defenders—Trayner—Dickson.
Agents—J. & A. Hastie, S.S.C.

Saturday, July 1.

FIRST DIVISION.

[Lord M'Laren, Ordinary.]

MACDONALD v. BUTLER JOHNSTONE.

Lease—Damages caused to Tenant by Operations of Landlord—Where Specific Complaint made but Rent Paid without Reservation.

An agricultural tenant who had during the years to which his complaint referred paid his rent and accepted receipts without any reservation of his claim for damages, brought an action of damages against his landlord for injury said to have been caused to his crops by flooding due to drainage operations of the landlord on a piece of ground adjoining his farm. It appeared from the correspondence between the parties that during so much of the period during which the damage was said to have been caused as the pursuer appeared to have been aware of the alleged cause of the damage to his crops, he made specific written complaint to the landlord of the result of the operations in question. The Court in the circumstances allowed a proof before answer of the pursuer's averments.

Entail—Representation—Damage from Acts done prior to Succession of Heir of Entail.

A tenant brought an action against his landlord, an heir of entail who succeeded to the entailed estate in 1873, for damage said to have been caused from and after the year 1867 by certain drainage works executed by the defender's predecessor, and which had been maintained by him. *Held* (per Lord M'Laren, Ordinary, and acquiesced in) that inasmuch as the defender did not represent the preceding heir of entail he was not connected by any relevant averment with the author of the damage, and that the action, so far as it concluded for damages caused before the defender's succession in 1873, was irrelevant.

In this action Donald Macdonald, tenant of the farm of Culcraigie, Ross-shire, sued his landlord Mr Butler Johnstone, heir of entail in possession of the lands of Cuntullick and Culcairn, on which his farm was situated, for damages to the amount of £1415, 12s. 6d. alleged by him to have been caused by the flooding at intervals during a series of years of a portion of his farm amounting to 25 acres. This flooding he alleged to have been caused by certain drainage operations of the defender which had been executed on his property after the pursuer entered into his lease.

The pursuer's lease began in 1864. The rent was £270, and a system of rotation of crops was prescribed. Power was reserved to the landlord to execute all necessary operations for the purpose of draining the estate on paying surface damage to the tenant, the damage to be ascertained by arbitration.

The defender succeeded to the entailed estates in 1873.

The farm was bounded on one side by a wooded hill, the property of the defender.

The pursuer averred that when he entered on the farm, and for some years thereafter, the drainage was quite satisfactory; but from and