

will have to determine. Accordingly, I think the Lord Ordinary has gone too fast, and that the case must go the trial.

LORD M'LAREN—It seems to be settled by the case of *Crombie* that no action will lie because of informality attending proceedings incidental to a decree in the Small Debt Court—in short, while the case is under the control of the judge in that Court he can correct any error before pronouncing decree, and the holder of a decree has protection by statute against its being reduced. But when the case has passed out of the Sheriff's hands, I cannot see why a small-debt decree should confer a higher immunity upon a creditor in carrying it into execution than that enjoyed by holders of decrees in any other Court. A decree in this Court, affirmed it may be by the House of Lords, must be regularly enforced, and any informality in its execution is open to challenge. It is no answer to say that the decree being executed is a final decree, and not appealable to any other Court. Its finality only warrants lawful execution. In that respect there is no difference between decrees of this Court and those of the Small Debt Court. Therefore, upon the question of the objection to the execution of this charge I think there is issuable matter.

But it is argued that under the 1882 Act it was sufficient if a registered letter were sent to the pursuer's last known address. According to the pursuer's statement, the house in Musselburgh was neither his present address nor his last address known to the defenders, because the factor knew perfectly well he had moved to Cockenzie. I have no doubt if a person goes on a holiday he may be well cited by a registered letter, because he ought to make arrangements for getting his letters, but here it is said for the pursuer that he had finally given up the Musselburgh house. However that may be, we are at present on relevancy, and must accept the pursuer's statements, and I cannot hold with the Lord Ordinary that his case is altogether irrelevant. On the contrary, I am of opinion that if the facts he avers are true a wrong has been done for which compensation will be due.

LORD KINNEAR—I am of opinion that the Lord Ordinary is perfectly right as to the effect of the decree in the Small Debt Court and as to any irregularity in the proceedings leading up to that decree, but it is quite different with regard to the execution of the decree. The pursuer says he found his furniture had been sold, and that without any notice to him. It is said that that is not relevant because vague. I cannot see why the pursuer need say more than that he knew nothing about the sale if that is so. That puts it upon the other party to show what means he took to inform the debtor. I can imagine the sheriff-officer returning a conclusive answer, but here a question of fact is involved, and the only proper mode is to allow the pursuer to have the verdict of a jury. The

ultimate defence is that a registered letter was sent to the debtor's last known address, but what that was is just an additional fact to be ascertained by evidence, which we cannot assume one way or the other at this stage.

The Court pronounced the following interlocutor:—

“ . . . Adhere to said interlocutor in so far as it sustains the pleas therein mentioned as applicable to the objections to the decree of the Small Debt Court, and procedure antecedent thereto: *Quoad ultra* recal the said interlocutor, and remit to the Lord Ordinary to adjust an issue or issues for the trial of the cause, and to proceed further as may be just: Find the pursuer Robert Gray entitled to expenses.” . . .

Counsel for the Pursuer and Reclaimer—Watt—M'Lennan. Agent—Robert Broatch, L.A.

Counsel for the Defender and Respondent Miss Smart—Wilson. Agents—Macfarlane & Richardson, S.S.C.

Counsel for the Defender and Respondent M'Donald—F. T. Cooper—T. B. Morison. Agent—Peter Morison, S.S.C.

Friday, March 18.

SECOND DIVISION. MACKENZIE v. CAMPBELL.

Poor's Roll—Admission Refused.

An unmarried man earning 24s. a-week was *refused* admission to the poor's roll for the purpose of raising a petitory action for the sum of £40.

Duncan Mackenzie, a labourer at the Aberfoyle Slate Quarries, unmarried and earning 24s. a-week, applied for admission to the poor's roll, to enable him to raise an action against his former employer, Dr Campbell, lessee of the Ballachulish Slate Quarries, for £40 alleged to have been illegally retained from his wages in violation of the Truck Acts.

Dr Campbell opposed the application.

The applicant cited the cases of *Stevens v. Stevens*, January 23, 1885, 12 R. 548, and *Paterson v. Linlithgow Police Commissioners*, July 4, 1888, 15 R. 826. In the latter case the applicant had 27s. a-week.

Argued for Dr Campbell—The Lord President's opinion in the case of *Robertson*, July 8, 1880, 7 R. 1092, was conclusive against admission. Indulgence had been shown in cases which could only be brought in the Court of Session, but this was not of that character. It could be raised in the Debts Recovery Court.

At advising—

LORD JUSTICE-CLERK—This is a case to which we have given great consideration and have had the advantage of consulta-

tion with the Judges of the other Division. The case is that of a man with 24s. a-week and unmarried, who applies for the benefit of the poor's roll. Without laying down any general principle or saying anything that would affect any other case. I am of opinion that the applicant in this case is not entitled to prevail.

LORD RUTHERFURD CLARK and LORD TRAYNER concurred.

LORD YOUNG was absent.

The Court refused the application.

Counsel for Applicant—Adam. Agent—C. T. Cox, W.S.

Counsel for Dr Campbell—W. Campbell. Agents—Murray, Beith, & Murray, W.S.

Friday, March 18.

SECOND DIVISION.

RAIT v. ARBUTHNOTT.

Succession—Destination in Will—Fee and Liferent—Parent and Child—To Parent in Liferent and Children not Named in Fee—Retention of Fee by Testator's Executor till Death of Liferenter.

A testator directed his executors to pay his widow the free income of the residue of his estate during her life, "and after her death, or after my death if she shall predecease me, I leave and bequeath the liferent of the said residue or remainder to" his son "during the whole days of his life, and in regard to the fee of the said residue or remainder, I hereby leave and bequeath the same to the child or children of my said son, with power to my said son to apportion the said fee amongst his children in such manner as he may think right, and failing such apportionment the said fee shall be payable amongst the said children equally, share and share alike." After the death of the testator and his widow, survived by his son, who had issue—held (1) that the testator's son had no right to the fee of the residue, and (2) that the executor was bound to retain the residue in his own hands until the death of the son.

Succession—Legitim—Obligation Undertaken by Father in Son's Marriage-Contract—Collation.

A father in the marriage-contract of his son undertook to cause to be vested in the marriage-contract trustees a third part of the whole property which should belong to him at the time of his death. In his last will the father directed his executor to perform the obligation undertaken by him in the said marriage-contract. On the death of the father, held (1) that the son was entitled to claim legitim out of the residue of the father's estate remaining after performance of the said obliga-

tion, and (2) that in claiming legitim the son was not bound to impute thereto the provision made for him by the father in the marriage-contract.

In the marriage-contract of his daughter Mrs Kathleen Georgina Arbuthnott or Rait, dated 6th August 1877, the Honourable Walter Arbuthnott bound and obliged himself, and his heirs, executors, and successors, to make payment at the first term of payment after his death to the marriage-contract trustees, for the ends, uses, and purposes therein written, "one just and equal third part of the whole property, heritable and moveable, real and personal, which shall belong to him the said Walter Arbuthnott at the time of his death.

In the marriage-settlement of his son Walter Charles Warner Arbuthnott, dated 14th January 1878, the Honourable Walter Arbuthnott covenanted with the trustees under the marriage-settlement "that in case the said Walter Charles Warner Arbuthnott, or any issue of the said intended marriage, shall be living at the death of him the said Walter Arbuthnott . . . then . . . he the said Walter Arbuthnott will, by his last will, or some codicil or codicils thereto, or some other instrument, well and effectually give, devise, and bequeath unto, or otherwise cause to be vested in the trustees, one full third part in value at least of the residue, after payment of his funeral and testamentary expenses and debts, of all the heritable and moveable property and other real and personal estate to which he the said Walter Arbuthnott, or any person or persons in trust for him, shall at his death be entitled, in possession, reversion, remainder, or expectancy, or otherwise howsoever . . . and that in case he the said Walter Arbuthnott shall not in any manner, and subject only as aforesaid, well and effectually give, devise, and bequeath unto, or otherwise cause to be vested in the trustees one full third part in value at least of such residue as last aforesaid, then one-third part in value at least of such residue as last aforesaid, shall immediately after the death of him the said Walter Arbuthnott, and at the cost of his estate, and subject only as aforesaid, be assured and transferred by his heirs, devisees, executors, and administrators, and all other necessary parties, if any, unto or otherwise vested in the trustees."

Mr Arbuthnott, who was a domiciled Scotsman, died on 5th January 1891, leaving a last will and settlement dated 27th July 1886, and registered in the Sheriff Court Books of the county of Kincardine 14th January 1891. The said last will and testament was in the following terms—"I, the Honourable Walter Arbuthnott, residing at Hatton, in the county of Kincardine, in order to settle my affairs after my death, do hereby nominate and appoint my son-in-law Arthur John Rait, Esquire, of Anniston, late Major in the Royal Horse Artillery, Companion of the Order of the Bath, to be my sole executor, with full power to him to intromit with my whole moveable estate, and I direct my