*Tuesday, December* 11.

FIRST DIVISION.

[Lord Kyllachy, Ordinary.

## ASSETS COMPANY, LIMITED *v.* SIMSON AND OTHERS.

*Jurisdiction—Action of Reduction—Prorogation of Jurisdiction.*

In an action of reduction the defenders lodged preliminary defences in which no exception was taken to the jurisdiction, and, upon these being repelled, they satisfied the production without objection.

*Held* (*aff.* judgment of Lord Kyllachy) that they had prorogated the jurisdiction of the Court, and that it was too late for them to state a plea of no jurisdiction when the record was made up on the merits.

*Process — Trustee — Action against Discharged Trustee for purpose of Constituting Claim against Trust-Estate — Competency.*

After a testamentary trustee had distributed the trust-estate among the beneficiaries and received his discharge, an action was brought against him for reduction of a deed granted in favour of the testator, and for count, reckoning, and payment. The purpose of the action was to constitute a debt alleged to be due by the testator's estate to the pursuers.

*Held* (*aff.* judgment of Lord Kyllachy) that the action was competent.

The Assets Company, Limited, Edinburgh, being in right of the whole assets of the City of Glasgow Bank under and in virtue of The City of Glasgow Bank (Liquidation) Act 1882, and relative discharge by the liquidators thereof in their favour, brought an action against Thomas Simson, writer, Jedburgh, sole surviving trustee of the deceased Robert Falla, who died in 1884, for reduction of an agreement and discharge executed by the said liquidators in favour of the said Robert Falla on 31st December 1879, and for count and reckoning and payment of £19,000 as the amount of the defender's intromissions with the estate.

The pursuers averred that the said agreement and discharge, by which the calls due by Robert Falla to the bank had been compromised, had been obtained by a false statement as to the amount of his estate.

The defender explained that the estate of Mr Falla had been *bona fide* divided among those entitled thereto, and that he had been duly discharged, and was absolutely denuded of the whole trust-estate.

He pleaded—"(1) All parties not called. (3) The action against the defender is incompetent and unnecessary, and ought to be dismissed."

Thereafter the pursuers raised an action against John Falla Smith and others, the beneficiaries on the estate of Mr Falla, who were all resident in England, for reduction of the said agreement and discharge. These defenders lodged preliminary defences which contained no challenge of the jurisdiction, and upon these being repelled, satisfied production by producing the deed sought to be reduced. At the closing of the record on the merits, however, they added (as their first plea) a plea of "No jurisdiction."

The actions were conjoined.

Upon 17th November 1894 the Lord Ordinary (KYLLACHY) pronounced the following interlocutor—"Having considered the conjoined actions (1) in the action against Falla's trustee, Repels the first and third pleas-in-law for the defender; and (2) in the action against John Falla Smith and others, repels the first plea-in-law for the defenders; and in the conjoined actions, before further answer, allows the parties a proof of their averments and the pursuers a conjunct probation."

"*Opinion.*—In these conjoined actions I may, in the first place, deal with the action at the instance of the Assets Company against Robert Falla's trustee. In that action the company conclude for reduction of a certain discharge, and for count and reckoning and payment of a certain sum (£19,000) by the defender. There is an alternative conclusion directed against the defender as trustee to make payment of the sum in question, and undoubtedly, however the summons may be expressed, it is under it open to the pursuers to claim and obtain a decree of constitution, which shall not affect the defender personally, but solely as trustee. The trustee has entered appearance, and amongst other pleas he has stated two which were the subject of discussion the other day. One of these pleas was to the effect that the action against the defender was incompetent and unnecessary, and ought to be dismissed, and that was maintained on the ground that the trustee had long ago paid away to the beneficiaries the whole trust-estate, and had been fully discharged by the beneficiaries. Now, I am not sure that upon the materials before me I could without inquiry affirm the fact upon which the defence rests. But I do not find it necessary to consider that question, because I am of opinion that, even if the fact be as the trustee states, the action is not incompetent, at all events as an action for constitution. The trustee may, of course, defend upon the merits, or abstain from defending as he chooses, but I am not prepared to say that it is incompetent to sue even a discharged trustee for the purpose of constituting a claim against the trust-estate.

"I propose therefore to repel the third plea for the defender. And with respect to the other plea argued, or at least proponed—I mean the plea that all parties are not called—I think, in the first place, that that has probably been obviated by the action against the beneficiaries which the company have now brought, and which is conjoined with the present action. But, in any case, I do not consider that the plea of all parties not called is a good one where it appears, as here, that the parties named

are outside the jurisdiction. I propose therefore to repel the first and third pleas stated for the defender, and to allow the action to proceed.

"In the other action, which has been conjoined with the first, the position seems to be this. The pursuers conclude for reduction of the discharge against the beneficiaries to whom the trust-estate was some years ago paid away. These beneficiaries are resident in England, and it is not suggested that the Scottish courts have jurisdiction over them upon any of the usual grounds upon which jurisdiction is based. But it is said that these defenders, having been called, have prorogated the jurisdiction of the Court, and the question I have to consider is, whether they are to be held as having done so. Now, the ground on which they are said to have done so is this—they lodged preliminary defences, and in these preliminary defences said nothing about jurisdiction, and then when the case came before the Court they consented to satisfy the production, and thereafter did satisfy the production. It is said that by thus satisfying the production without objection and without reservation, the defenders have submitted themselves to the jurisdiction of the Court—that is to say, have prorogated the jurisdiction, and cannot raise, as they now propose to do in the record which has been made up on the merits, the question of jurisdiction, which they did not raise in their preliminary defences.

"Now, it may be that the defender to a process of reduction is not bound, as against satisfying the production, to state every defence which is capable of being stated to that effect. The Court of Session Act 1850 so directs; but it has been held that no sanction is attached to its provisions, and that the same are only directory—*Mackintosh* v. *Arkley*, 6 Macph. (H.L.) 141. It may therefore be that a defender can, if he chooses, postpone until he lodges his defences on the merits such pleas as incompetency or want of title. In other words, he is not held by satisfying the production to admit the competency of the action or the pursuer's title. But jurisdiction is, in my opinion, a different thing from competency or title, and it appears to me that a defender who, being called into Court in a reduction, appears, and takes an order to satisfy production, without protest or reservation, must be held at least to submit himself to the jurisdiction of the Court. I do not know how, if prorogation of jurisdiction is possible, it could be better evidenced than by production of the document called for, 'to be seen and considered by our said Lords, and to hear and see the same, with all that has followed or may follow thereon, reduced,' &c., &c., as set forth in the summons. I was referred to certain *dicta* in the case of *Reoch* v. *Rob*, 9 S. 588, which seem to indicate that in the opinion of eminent judges jurisdiction cannot be prorogated by a foreigner—the ratio apparently being, that there can be no jurisdiction where no means exist for making the decree of the court effectual. I do not, however, find that those *dicta*, which were not, I observe, necessary to the decision, have since been followed. Indeed, I rather think there must be some mistake in the report. In any case, they would not necessarily apply to the defenders resident in England, who are now under the Judgments Extension Act liable to diligence upon Scotch decrees or to actions like the present where no pecuniary decree is sought.

"On the whole matter, and having considered the authorities cited, I am of opinion that jurisdiction could be prorogated by these defenders, and that there has been sufficient prorogation. I propose therefore in this case to repel the first plea-in-law and order a proof, and, on the whole, the result will be that there will be a proof before answer in the conjoined actions."

The defenders reclaimed, and argued—(1) The Court had no jurisdiction against the beneficiaries, and such a plea could be stated as a preliminary defence, or as a defence to satisfying production, or at any time up to the closing of the record—*Mackintosh* v. *Arkley*, May 28, 1868, 6 Macph. (H.L.) 141; *Watt* v. *Thomson, &c.*, May 24, 1870, 8 Macph. (H.L.) 77. Even a plea repelled as against satisfying production might be reserved as a plea in the action—*United College of St Andrews* v. *Blyth*, March 19, 1864, 2 Macph. 810; *Charles* v. *Charles' Trustees*, May 19, 1868, 6 Macph. 772; *Shaw* v. *Dow & Dobie*, February 2, 1869, 7 Macph. 449. (2) There had been no prorogation of the jurisdiction merely by satisfying the production—*Reoch* v. *Rob*, May 14, 1831, 9 S. 588. (3) As regarded the trustee, the action was incompetent. He had been discharged, and constitution of the debt was unnecessary. The beneficiaries, if within jurisdiction, could have been sued directly.

Argued for the pursuers—(1) There had been prorogation of the jurisdiction—Ersk. Inst. i. 2, 27. If prorogation could ever be presumed from tacit consent, it must be here. In the preliminary defences no objection to the jurisdiction had been taken, and the defenders had asked to be allowed to satisfy production. By pleading and by satisfying production without protest, and by their whole conduct, they had submitted to the jurisdiction. Their plea of no jurisdiction was now too late. In *Charles'* case that plea was repelled once and for all; it was not reserved. *Shaw's* case was peculiar. The plea there was reserved, because the same set of facts would determine the jurisdiction and the merits of the case. (2) Decree of constitution was necessary. Decree was not asked against the trustee personally, but against him for any trust-funds that might still be in his possession. He could defend or not as he liked, but the action against him was clearly quite competent.

At advising—

LORD PRESIDENT—I entirely agree with the Lord Ordinary on both points. As regards the point first discussed to-day—the position of the beneficiaries—I think the case is conclusively made out against the

defenders. As things stand, that case rests not alone on their having satisfied production, but on this as the result of their whole course of conduct as deduced by Mr Murray. They first submitted to the decision of the judge defences which do not contain a challenge of the jurisdiction, and then, when these were disposed of in a certain way, and the defenders in the ordinary course had to meet the call in the summons to satisfy production, they met that call by production of the writ without objection, and so enabled the judge to proceed to deal with the defences which they had stated. The fact that after this they added to their record a plea against the jurisdiction of the Court did not, in my judgment, retrieve the position which they had lost.

As regards the second point, I think the reclaimers exaggerate the importance of the conclusion against the trustee, for he is brought into the action only as trustee to see something being done with the trust-estate. It is for him, as the Lord Ordinary says, to consider whether he will appear to defend or not, but to say that it was in any way incompetent for the pursuers to call him appears to me to be out of the question.

LORD ADAM, LORD M'LAREN, and LORD KINNEAR concurred.

The Court adhered.

Counsel for the Pursuers—Graham Murray, Q.C. — Salvesen. Agent — J. Smith Clark, S.S.C.

Counsel for the Defenders—C. S. Dickson —Cullen. Agent—J. Murray Lawson, S.S.C.

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*Wednesday, December 12.*

## FIRST DIVISION.

[Lord Low, Ordinary.

## PLACE *v.* WEST HIGHLAND RAILWAY COMPANY.

*Railway — Company — Deposited Plans— "Delineated"—Powers to Take Land Compulsorily.*

A railway Act empowered the company to take compulsorily the lands delineated upon the deposited plans. A triangular plot of ground was delineated as bounded on one side by the railway of a different company, on another by a road, and on the third or west side by a dotted line. The lines which showed the limits of deviation terminated towards the west in this dotted line, and west of it nothing was shown on the plan except the road and the railway of the other company, which were continued, the road for a short, and the railway for a longer distance.

*Held* that the company were not entitled under their compulsory powers to take any land to the west of the dotted line.

The West Highland Railway Company obtained power under their Act of 1889 to take compulsorily, for the purposes of their undertaking, the lands delineated upon the deposited parliamentary plans, and described in the books of reference.

A portion of these lands was numbered "61" on the parliamentary plan, No. 32 of process. It was triangular in shape, having the Callander and Oban Railway line on its north side, a public road on its south side, and as a base (to the west) a dotted line (termed by the Lord Ordinary "the limit of deviation line"). To the north and south of this triangular plot dotted lines showing the limits of deviation were marked on the plan. These dotted lines terminated towards the west in the dotted line, part of which formed the base of the triangular plot. To the west of this dotted line nothing was shown on the plan except the public road and the Callander and Oban Railway, which were continued respectively 100 feet and 2500 feet. In the book of reference No. 61 was described as "pasture land."

It had been intended to form a junction between the two railways at or east of the triangle, but a dispute having arisen between the companies the arbiter appointed by the Board of Trade decided that the junction should be made further to the west. Accordingly, it became necessary for the West Highland Railway Company to acquire ground to the west of the dotted line which formed the base of the triangle. This they endeavoured to do under their compulsory powers by serving a notice upon Edward Gordon Place, Esq. of Loch Dochart, the proprietor of the whole land in question, with a relative plan showing, as the ground proposed to be taken under No. 61, not only the triangle shown on the parliamentary plan, but two strips of ground extending along the south side of the Callander and Oban Railway for a distance of 1200 feet to the west of the dotted line forming the base of the triangle. The land so proposed to be taken was pasture land.

In May 1894 Mr Place brought an action against the West Highland Railway Company to have them interdicted from entering upon the land shown in the notice, so far as it lay to the west of the dotted line on the parliamentary plan, as not being included in the lands which they were empowered by their Act to take.

The respondents pleaded—"(1) The respondents being entitled under their Act to acquire, and having acquired, the said land No. 61, by virtue and in terms of their notice to treat and plan relative thereto and the Acts mentioned in said notice, and being now in the lawful and permanent possession of said lands, the present action is incompetent. (3) The said land No. 61 being delineated upon the deposited plans, and being necessary for the construction of said junction with the Callander and Oban Railway and works connected therewith, and the acquisition thereof