

Friday, November 12.

FIRST DIVISION.

[Lord Kincairney, Ordinary.]

ERENTZ'S TRUSTEES v. M'LAY  
(ERENTZ'S JUDICIAL FACTOR).

*Expenses — Trustee — Action by Judicial Factor against Trustees who have Resigned—Extrajudicial Expenses.*

An action of count, reckoning, and payment was raised against trustees who had resigned office, by the judicial factor on the trust-estate. The action was directed against the trustees as individuals. Although the trustees had resigned office they had not received their discharge under a pending petition, and still retained in their hands a part of the estate. The defenders successfully resisted the action. They were prepared to hand over the balance of the trust estate in their hands to the judicial factor on receiving their discharge.

Held that the defenders were entitled to retain out of the trust-estate the extrajudicial expenses incurred in defending the action.

A petition was presented in May 1894 by trustees under the marriage-contract of Mr and Mrs Erentz, craving the Court to appoint a judicial factor on the marriage-contract estate, to authorise them to resign office, and to grant a discharge.

In October 1894 Mr James M'Lay (a Glasgow chartered accountant) was appointed factor, and the petitioners were allowed to resign office, which they subsequently did. Thereafter an action of count, reckoning, and payment was raised against the petitioners as individuals at the instance of the judicial factor, and the procedure in the petition was suspended pending the issue of the action. The petitioners lodged in process an account of their intromissions, and after sundry procedure the Lord Ordinary (KINCAIRNEY) on 19th February 1897 assoilzied them from the conclusions of the action, and found them entitled to expenses.

The petitioners thereafter lodged an account of their intromissions with the trust funds in their hands, subsequent to the date of the account lodged in the action. They stated that the balance left in their hands amounted to £351, 13s. 8d., which they offered to pay over to the judicial factor on obtaining an order for discharge, which they craved the Court to grant. The judicial factor objected, *inter alia*, to the deduction by the petitioners of certain sums from the balance in their hands for extrajudicial expenses incurred by them in defending the action of count, reckoning and payment. The Lord Ordinary (KINCAIRNEY) on 2nd September 1897 pronounced an interlocutor by which he found that the sum due by the petitioners to the judicial factor was £351, 13s. 8d., as set forth in their note, and in respect of

payment by them of that sum discharged them in terms of the prayer of the petition.

The judicial factor reclaimed, and argued — The petitioners had been called in the action as individuals, having been allowed by the Lord Ordinary to resign office. They were in no better position than an ordinary defender; the fact that they had still funds in their hands belonging to the estate did not alter their position. In any case, the finding of expenses in the interlocutor of 19th February 1897 only implied expenses between party and party, and it was too late now to ask for extrajudicial expenses; the motion should have been made before the Lord Ordinary at the time of the action — *Fletcher's Trustees v. Fletcher*, July 7, 1888, 15 R. 862.

LORD PRESIDENT—I have heard nothing to shake the soundness of the Lord Ordinary's judgment.

On the main question it is quite clear that these two gentlemen, albeit they had resigned, were still vested in a part of the estate, not as proprietors, but as trustees, in this sense, that they held it for the judicial factor, and were ready to hand it over to him if he would be so good as to receive it. But he brought an action which turned out to be unsuccessful, the effect of which would have been, if successful, to have converted the trust-estate into a personal liability of the trustees instead of the subjects which these two gentlemen held and were ready to hand over. In these circumstances they were fairly entitled to be treated just as if they had not parted with the estate, but were holding it until the judicial factor was ready to relieve them of their duty.

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

The Court adhered.

Counsel for the Petitioners and Respondents—Ure—Cooper. Agents—Drummond & Reid, W.S.

Counsel for the Reclaimer — Guthrie — Craigie. Agent—James Russell, S.S.C.

Saturday, November 13.

SECOND DIVISION.

[Sheriff-Substitute of  
Renfrew and Bute.]

THOMSON v. SCOTT & COMPANY.

*Reparation—Master and Servant—Negligence—Contributory Negligence—Insufficient Precautions for Safety of Workmen Repairing—Employers Liability Act 1880 (43 and 44 Vict. c. 42), sec. 1, (1), (2) and (3).*

In an action of damages brought by the representatives of a workman against his employers, the pursuers