

of his non-appearance. Now, I think that, looking to the fact that the procedure was unusual and *extra cursum curiæ* (the *Cessio* Acts and Acts of Sederunt not containing any provisions for an adjournment in such a case), the Sheriff was bound to have seen, before pronouncing decree of *cessio*, that due intimation of the adjourned diet had been given to the debtor.

“But be this as it may, I think that it was contrary to the good faith of the arrangement made by M'Caig on 13th February to move again in the *cessio* without of new citing or giving intimation to the debtor. I do not think that M'Caig acted from any fraudulent motive in taking decree without intimation to the debtor; and further, I do not say that there were not grounds for his wishing to revive the *cessio* proceedings. But he was so intent on obtaining decree and having himself appointed trustee that he appears to have acted in utter forgetfulness or disregard of the interests of the debtor. He was actually present when decree was pronounced, and knowing what he did, he was not entitled to sit silent and allow the Sheriff to pronounce decree on the assumption that Reid's absence was wilful. Mainly on this ground, I think it is impossible to allow the decree so obtained to stand. I arrive at this conclusion with some reluctance, because I think that it was in great part owing to the wrong-headedness of the present pursuer that decree was taken. If she had not impugned the trust in favour of M'Caig and Munro, and had ceded possession of the premises, they would have been handed over to the purchaser, the price would have been available for the creditors, and there would have been no excuse for resorting to the *cessio* proceedings. Besides, on record the charge of impetration is renewed. For those reasons, and others which I need not specify, there must be a material modification of expenses found due to the pursuer.”

The defenders reclaimed, and argued—There had been no informality. The debtor had been properly cited to appear at the meeting of 28th February, and *cessio* could have been competently taken out then. The adjourned meeting was the same as the meeting upon the 28th February, and his absence was therefore wilful.

Counsel for the pursuer was not called on.

At advising—

LORD YOUNG—I think it is very important as regards the future practice in such matters that we should express an opinion upon the case now before us. My opinion upon the matter is quite clear, and it is founded upon section 9 of the Bankruptcy and *Cessio* (Scotland) Act of 1881. The purpose of that section was to provide a sharp remedy against any creditor who was contumacious and wilfully refused to obey the orders of the Court. The words of the section are—“If the debtor fail to appear in obedience to the citation under a process of *cessio bonorum* at any meeting to which he has been cited, and if the Sheriff shall be satisfied that such failure is wilful he may in the debtor's absence pronounce decree of *cessio bonorum*.” It is a course taken with the view of preventing a debtor who had been duly cited to attend the diet from contumaciously absenting himself. But he must be duly cited to attend the diet, and there must be no excuse which can reasonably be taken for

his absence; the Sheriff in fact must be satisfied that the debtor is wilfully contumacious. I have no doubt that the Sheriff could adjourn the diet, and that the *cessio* could be granted at the adjourned diet, but then it must be given at a diet called according to the statute—*i.e.*, a meeting to which the creditor had been cited—and the Sheriff must be satisfied that he was wilfully contumacious. I do not think that these things could be predicated of the meeting at which this decree of *cessio* was given. Reid was not duly cited to attend the diet, and so he could not be wilfully contumacious. I think the whole proceedings are inept.

LORD RUTHERFURD CLARK—I do not think it necessary to give a decision as to the wording of the interlocutor of the Sheriff-Substitute, but I wish to state my opinion upon it. If the Sheriff in such a proceeding as this pronounces what is practically a decree in absence, upon the ground that the debtor has wilfully absented himself from the diet of the Court, I think that he should state that in his opinion such is really the case. I do not wish to decide that such a finding in his interlocutor is necessary, but I think that it would be much better if there was such a finding.

LORD LEE concurred.

LORD JUSTICE-CLERK—I quite agree with all that has been said by your Lordships as to the advisability of the Sheriff showing that in his opinion the debtor had wilfully absented himself from the diet of the Court by making some finding in his interlocutor. In this case the Court is of opinion that Reid had not been duly cited to appear upon the 16th March, and therefore the decree of *cessio* must be reduced.

The Court adhered.

Counsel for the Appellants—H. Johnston—Wilson. Agent—James Coutts, S.S.C.

Counsel for the Respondent—Salvesen—A. S. D. Thomson. Agents—Sturrock & Graham, W.S.

Friday, June 7.

FIRST DIVISION.

DELANEY v. COLSTON AND OTHERS.

Parent and Child—Custody—Child placed Voluntarily in Charitable Institution.

In 1882 a father voluntarily placed his three children, aged respectively four years, two years, and a few months, in the hands of the founder and superintendent of a charitable institution for children, who, after keeping them in one of the homes of the institution for a period of four years, removed them in 1886, without the consent of their father, to a property belonging to her in Nova Scotia. In 1884 directors were appointed, but they did not assume the management of the institution until 1887, when the superintendent resigned. In consequence of threatened legal proceedings, the superintendent, on the advice of the direc-

tors, brought back the children in the end of 1886, but the directors allowed her to conceal them from their parent, and from the directors themselves. After her resignation in 1887 the superintendent again removed the children abroad.

In a petition by the father for an order on the directors to deliver his children to him—*held* that though the superintendent was originally alone responsible for their custody, yet the respondents by becoming directors incurred the obligation of re-delivering the children to their father, and as through their negligence the children had been removed outwith the jurisdiction of the Court, the prayer of the petition was *granted*.

The Edinburgh and Leith Children's Aid and Refuge was founded by Miss E. M. Stirling, who was its honorary superintendent, and contributed largely to its maintenance.

In December 1882 Arthur Delaney, painter, Cowgate, Edinburgh, applied for admission to the homes of the institution for his three children, aged respectively four years, two years, and a few months. Delaney agreed to pay 5s. per week for the children's board, and they were accordingly received into one of the homes situated in Mackenzie Place, Stockbridge. The total payments made by him amounted to £1, 17s.

In June 1888 Delaney presented this petition for recovering the custody of his children.

Answers were lodged by the directors of the institution, in which they denied liability, and averred that it was Miss Stirling who had taken the children away, and that they had done all in their power to assist the petitioner to recover them.

A proof before Lord Adam established the following facts:—Prior to 1884 Miss Stirling managed the institution along with a committee, some of whom afterwards became directors. After 1884 directors were appointed, but Miss Stirling continued to manage the homes. In 1887 Miss Stirling terminated her connection with the homes in favour of the respondents. Miss Stirling had acquired a property in Nova Scotia that it might be a temporary home where she could maintain destitute and neglected children sent out from this country until they were placed in suitable homes in Nova Scotia. Of the petitioner's children, one was taken by Miss Stirling to Nova Scotia in May 1886, and the other two in August of the same year. In the end of the year 1886 the petitioner, through a law-agent, applied to the respondents for the children's address, which was at once given to him. He thereafter threatened proceedings for the return of the children. Shortly afterwards, and in order to save any trouble, the respondents communicated with Miss Stirling, recommending her to bring the children back to this country on her return. Miss Stirling, acting on this advice, brought back the children with herself in November 1886, and the respondents believed she took them to her private residence, which was then at Wardie, near Edinburgh. Miss Stirling, however, never restored the said children to any of the homes under the management of the respondents, and she never informed them how the said children were disposed of. Miss Stirling returned to Nova Scotia with the children on or

about May 1887. The directors of the homes had no connection with Miss Stirling's property abroad, nor were they in any way responsible for Miss Stirling's conduct of children whom she took out with her.

Delaney prepared a similar petition to the present in the end of 1886, when the children were in this country, but it was not proceeded with owing to want of funds. He had made frequent applications at the homes and to Miss Stirling, and through his solicitor, but he had not been able to obtain any definite information regarding his children, or to secure an interview with them. It was believed that at the date of the present application the children were in Nova Scotia.

Argued for the petitioner—Miss Stirling was in fault in removing the children abroad, but the respondents had assisted her in keeping the children. They could have forced Miss Stirling to give him both information of and access to them in 1886. The blame was joint, and the respondents ought to be ordained to restore the children to the jurisdiction of the Court.

Argued for the respondents—The children were committed by the petitioner to Miss Stirling, and not to the respondents. Her connection with the homes was severed in 1887, and the respondents could in no way control Miss Stirling's actings, nor were they aware where the children were at the present time. The petitioner was himself to blame for not taking action when the children were brought back to this country in 1886. He virtually consented thereby to their being taken away again, as it was supposed he had abandoned them.

After the discussion the following minute was lodged by the respondents:—“*LORDS*, for the compearing respondents, stated that in consequence of the expression of opinion by the Court that the prayer of the petition could not be refused, the respondents undertake to apply forthwith to Miss Stirling for the return of the children to them, and if necessary, to take proceedings in the Canadian Courts for that purpose; and they crave that in the meantime any judgment pronounced by the Court should be limited to the first finding in the prayer of the petition, namely, that the petitioner is entitled to the custody of his children.”

At advising—

LORD PRESIDENT—When the petitioner applied in the month of December 1882 to have his children received into what is called the Edinburgh and Leith Children's Aid and Refuge, in point of fact the children were received by Miss Stirling, and it does not appear that anybody else was responsible for the custody of the children at that time except Miss Stirling. But it must be quite clear, I think, that when the respondents became directors of this institution in the year 1884 they assumed a responsibility for the safe custody of all the children that were in these homes or in other places belonging to the institution. And among other obligations and responsibilities which they thus incurred by becoming directors was the obligation to re-deliver the children to their parents when they were demanded.

Now, in point of fact, these children were taken out of the jurisdiction of this Court and out of the United Kingdom in 1886, and that was cer-

tainly a most indefensible proceeding. Nothing could justify that without the consent of the parents. The respondents, the directors of the institution, seem to have been sensible of that very soon after it took place, and they remonstrated with Miss Stirling, who had carried the children to Nova Scotia, and desired her to bring them back. In that I think they acted quite rightly. But then I think they acted very far short of their duty after the children were brought back to this country, because they allowed Miss Stirling, after she had brought the children to the neighbourhood of Edinburgh, to conceal these children—conceal them from their parents, and also from the respondents themselves.

Indeed there is an appearance on the part of the respondents of an indisposition to require any knowledge of where these children were, and to all applications on the part of the petitioner for access to his children there could be no satisfactory answer made. The consequence was that the children were again carried out of the country. Now, for that I think the respondents must be answerable, because they were thus violating the obligation which they had undertaken, to be responsible for the safe custody of the children while they were in the institution, and to deliver when the parents required them. It is therefore, I think, impossible not to say that the respondents are under an obligation to deliver these children now to the petitioner; and the only question which perplexes one in dealing with the case is, that as the children are not here it may require the lapse of some considerable time, perhaps proceedings in another country, in order to accomplish the object for which this petition was presented. I approve entirely of the spirit in which this minute is expressed, which Mr Lorimer has just read, and I am very glad to find from that that the respondents are now fully alive to what their responsibilities are. But I think it would be hardly consistent with the duty of the Court to abstain now from pronouncing an order against the respondents for the re-delivery of the children. Of course that must be qualified to this extent, that they must have time; and the order which I would propose, with your Lordships' concurrence, to pronounce is to ordain the whole parties called as respondents in the petition to deliver to the petitioner his children James, Annie, and Robina Delaney, named in the petition, and that on or before the first sederunt day in October next; and further appoint the respondents to report to the Court on Thursday 18th July next what steps have been taken in pursuance of this order.

LORD SHAND and LORD ADAM concurred.

LORD MURE, who had been absent during a part of the proceedings, delivered no opinion.

The Court ordained the respondents to deliver to the petitioner his children on or before the first sederunt day in October next, and further ordained the respondents to report to the Court on Thursday the 18th July next what steps had been taken in pursuance of this order.

Counsel for the Petitioner—James Clark. Agent—E. Denholm Young, W.S.

Counsel for the Respondent—Lorimer. Agent—R. C. Gray, S.S.C.

Tuesday, June 11.

SECOND DIVISION.

MACDONALD AND OTHERS v. MACDONALD'S EXECUTOR.

Deposit-Receipt—Donation—Value of Terms of Receipt where Gift alleged.

A deposited £286 in deposit-receipt in a bank in name of himself and B his brother, "to be drawn by them, or either or survivor," and retained the deposit-receipt in his possession. B and his daughter deponed that ten days before his death A, believing himself to be dying, made a donation of the money to B, and delivered to him the deposit-receipt.

Held that donation had been proved on the evidence of the donee and his daughter, corroborated by the terms of the deposit-receipt, as indicating some intention on the part of the deceased to benefit B.

The late John Macdonald died in Edinburgh, aged about seventy, unmarried and intestate, on 22nd December 1887. His brother Alexander Macdonald, 29 Marchmont Road, Edinburgh, was decerned his executor-dative *qua* next-of-kin. He delayed giving up an inventory of the deceased's estate and expeding confirmation, as he declined to include in said estate a sum contained in a deposit-receipt left by his brother, which was in the following terms:—

"*British Linen Company Bank, £286, 19s. 2d. stg. Inverness, 5th May 1887.*

"Received from Mr John Macdonald, Dochfour, and Mr Alexander Macdonald, his brother, to be drawn by them, or either, or survivor, Two hundred and eighty six pounds, 19/2 stg., which is this day placed to the credit of their deposit account with the British Linen Company."

There was also a deposit-receipt of the same date in the following terms:—

"*Caledonian Banking Company, Limited, £280, 11s. 4d. Inverness, 5th May 1887.*

"Received from Mr John Macdonald, Dochfour, and Mr Hugh Macdonald, Balmore, Abriachan, Two hundred and eighty pounds, 11/4 stg., repayable to either or survivor, which is placed to their credit on deposit-receipt with the Caledonian Banking Company, Limited."

Hugh Macdonald therein mentioned was a brother of the deceased, and had died in April 1887. The money contained in that deposit-receipt admittedly formed part of the estate of the deceased. Besides the money in these two deposit-receipts the deceased left about £35.

Duncan Macdonald and the children of another brother, as the next-of-kin of the deceased, raised this action of count, reckoning, and payment against the executor in the Sheriff Court at Edinburgh, by which they sought to have the sum of £286, 19s. 2d. included in the estate of the deceased.

The defender averred—"The deposit-receipt for £286, 19s. . . . consisted of moneys belonging jointly to the deceased John Macdonald and the