

Agent, or any general mandate to that effect conferred upon him by his appointment. But I think it would be a strong thing to refuse the Common Agent his expenses here, though he may have made a mistake, when the objection is stated for the first time at the conclusion of the cause. If the matter had been one for my own judgment, I confess I should have thought the question raised by the Duke of Athole one which it was not worth while for the Common Agent to contest; yet as Mr Allan seems to have put the matter in the hands of counsel to lodge answers only if he thought fit, I must assume that there was a question proper to be submitted to the adjudication of the Lord Ordinary. The Lord Ordinary who heard the argument did not treat the question as one not deserving his consideration, and these are circumstances favourable to the Common Agent's claim. I confess I think it very desirable that there should be some deliberate consideration by common agents, and perhaps intimation to the heritors, before such a step is taken as entering on litigation about the amount of free teind; but that is a matter which can only be dealt with by Act of Sederunt, or by regulations deliberately laid down by the Lord Ordinary with reference to future cases. On the whole matter, I am not prepared to visit the Common Agent here with personal liability for these expenses, as he seems to have only been following a practice which has been in use among common agents. But it would be desirable that in cases of small value the matter should be mentioned to the Lord Ordinary and his opinion ascertained before the record in the litigation is closed.

Counsel for the Common Agent then moved that he should be found entitled to the expenses of this discussion.

LORD M'LAREN—I shall not subject Sir Archibald Stewart to the expenses of this discussion, as the question was one which it was quite proper for him to bring before the Court, and one on which I have felt some difficulty.

An interlocutor was accordingly pronounced approving of the Auditor's report, allocating the expenses, other than those objected to by Sir A. D. Stewart, on the whole heritors generally and proportionally, and allocating the said expenses amounting to £100, 3s. 1d. against the heritors other than the successful litigant, the Duke of Athole; and further finding the Common Agent entitled to £4, 4s. as the expenses of the discussion on the objections to the Auditor's report, and decerning against the heritors generally for the same.

Counsel for Objector—Dundas. Agents—Dundas & Wilson, C.S.

Counsel for Common Agent—Keir. Agent—Party.

Saturday, February 25.

## SECOND DIVISION.

FERGUSON v. DYER.

(Before Lord Justice-Clerk, Lords Craighill, and Rutherford Clark.)

*Sheriff—Jurisdiction—Sheriff Court Act 1876 (39 and 40 Vict. c. 70), sec. 46—Judicial Factor.*

*Held* that a judicial factor appointed on the trust-estate of a deceased farmer, who had merely realised the moveable estate by selling the stock and cropping, was not subject to the civil jurisdiction of the Sheriff of the county in which the deceased resided, in respect he was not a person who carried on a trade or business and had a place of business in that county in the sense of the above enactment.

On 25th April 1881 John Ferguson, banker, Carnwath, presented a petition in the Sheriff Court at Lanark against James Logan, who carried on lime-works at his farm of Eastshield, for payment of an account for certain seeds and manure supplied to him. Logan lodged defences, but on 28th May following died while the action was in dependence. In July, John James Dyer, solicitor, Edinburgh, was appointed judicial factor on his trust-estate, the trustees named by the truster having failed.

The present petition was also presented in the Sheriff Court at Lanark by John Ferguson, and in it the pursuer prayed the Court to transfer the original petition against James Logan on 25th April 1881, to the effect that the pursuer might have such action and execution against the said John James Dyer, defender, as judicial factor on said estate, as he would have had against the said deceased James Logan during his lifetime, or as he might have had against him were he still in life.

The defender was personally cited.

The pursuer pleaded—"The defender being the judicial factor on the estate of the said deceased James Logan, the process and action by the pursuer against the said James Logan should be transferred against him as judicial factor aforesaid, and he should be decerned to pay the amount concluded for in said action as judicial factor aforesaid. The defender is subject to your Lordship's jurisdiction in respect he carries on the business of the late Mr Logan in Lanarkshire as farmer at Eastshield."

The defender explained in reply that he did not reside within the jurisdiction of the Sheriff of Lanarkshire and could not competently sist himself as defender in the principal action, and on the same ground he further pleaded that the present action of transference was incompetent.

He pleaded—"In respect the defender does not reside within your Lordship's jurisdiction, the action of transference is incompetent, and ought to be dismissed with expenses."

By 39 and 40 Vict. c. 70, sec. 46 (The Sheriff Courts (Scotland) Act), it is enacted as follows—"A person carrying on a trade or business and having a place of business within a county shall

be subject to the jurisdiction of the Sheriff thereof in any action, notwithstanding that he has his domicile in another county, provided he shall be cited to appear in such action either personally or at his place of business; it shall, however, be in the power of the Sheriff aforesaid, upon sufficient cause shown, to remit any such action to the Court of the defender's domicile in another sheriffdom."

The Sheriff-Substitute (BIRNIE), after hearing parties on the question of jurisdiction, allowed a proof. There were cited at the hearing the cases of *Cameron v. Chapman*, March 9, 1838, 16 S. 907; and *M'Bey v. Knight*, Nov. 22, 1878, 7 R. 255. Thereafter the Sheriff-Substitute found that the defender had collected in Edinburgh the accounts due to, and paid accounts due by, the factory estate; found in law that he was not carrying on a trade or business, and had not a place of business, at Eastshield within the meaning of the Sheriff Courts (Scotland) Act 1876; found that he was not within the jurisdiction of this Court, and therefore dismissed the action of transference.

On appeal the Sheriff-Depute (CLARK) found "That the late Mr Logan carried on the business of a farmer in Lanarkshire, and that an action was sometime ago raised against him by the pursuer in relation to claims affecting the said business: Found that after the said action had made some progress Mr Logan died, and the present defender was duly appointed judicial factor on his estate, and now represents the deceased in so far as those having claims thereon are concerned: Found that the present action of transference had been raised against him by the pursuer in virtue of the provisions contained in the 46th section of the late Sheriff Court Act: Found that on a sound construction of the said provisions the defender must be held as carrying on the business of farming, and having a place of business for that purpose, at the foresaid farm in Lanarkshire, although his domicile is in another county, and that he had been duly cited personally in terms of the said provisions: Therefore found he was subject to the jurisdiction of this sheriffdom: Recalled the interlocutor appealed against, and granted decree of transference as craved, and decerned."

He added this note—"This case was very ably debated, and at first sight did not appear to be free from difficulty. On full consideration, I have, however, come to be of opinion that the provisions of section 46 of the Act must be held as applying to a case such as the present, unless their effect was to be much more restricted than appears to have been intended by the Legislature. It may simplify the case if we first consider whether the Act would have been applicable if the original defender Logan had been resident in Edinburgh but carried on the business of a farmer in Lanarkshire, and had been personally cited. Now, if in such a case all his connection with the Lanarkshire farm had been some interest in the profits, joint or several, and if in no proper sense he could be said to carry on the business of the farm, much might be argued against the application of the Act. But if he were the real acting farmer, and *bona fide* carrying on the business of the farm in the same sense as a manufacturer or lessee of minerals carries on his business though resident in another county, the case becomes very different. To hold that in

such circumstances the Act would not apply would be practically to destroy its application in cases where it might be most necessary. It is suggested that farming is not a trade or business in the sense of the Act. It may not perhaps be a trade, but in the present day it seems to be a business, just as much as any other calling not properly a profession can be described as a business. The object of the Legislature was plainly to enable business creditors to recover their debts with as much despatch and at as little cost as possible. Now, in the present day, farmers stand in the same relation to those who furnish them with implements or artificial manures as do tradesmen to the merchant who provides them with iron, leather, or cloth. I see no reason for dealing differently with the creditor in the former case than with the merchant in the latter. I cannot, therefore, doubt that the deceased Mr Logan would in the supposed circumstances have been subject to the jurisdiction of this Court in virtue of the provisions of section 46.

"Does the judicial factor appointed on his estate stand in any different position?"

"If the deceased carried on business in Lanarkshire, his representative, the factor, must also be held to do so for the purpose of winding-up. He is not, indeed, resident in Lanarkshire, but neither *ex hypothesi* was Logan; but he just as much as Logan has *quoad hoc* a place of business in Lanarkshire till the estate is wound-up, to wit, the farm-steading in question. He also has been personally cited. That he resides in another county is his own affair. He is not a foreigner, nor does he *de facto* reside abroad. There is therefore no question as to the necessity of founding jurisdiction so as to bring him within the sphere of the Scotch Courts. He is not even in the position of an executor unconfirmed. His title is of the strongest kind, both active and passive. The only point is, whether he is liable to be convened in Lanarkshire, or must be proceeded against in the Midlothian Sheriff Court, or in the Supreme Court? Now, if this action had been an original action, the pursuer might have suffered great hardship if he were compelled to raise it out of the county. That hardship, however, becomes much intensified when it is considered that the action has already been for some time in dependence, and the present procedure is merely that of transference. On these grounds I am unable to read the provisions of section 46 otherwise than as applicable to a case of the present kind. The cases referred to by the Sheriff-Substitute do not seem to me to be in point. They deal with questions and a state of matters entirely different, namely, where the defender was resident abroad, and where, therefore, the provisions of the 46th section of the Act could have no application."

The defender appealed, and argued—The 46th section of the above Sheriff Court Act did not apply to the defender's case. He had merely in his capacity of judicial factor realised the moveable estate of the deceased by selling the stock and cropping. *Vide* Lord Gifford in *M'Bey v. Knight*, Nov. 22, 1879, 7 R. 255; *Wilson's Sheriff Court Practice*, p. 65.

The pursuer replied—Even before the Sheriff-Court Act of 1876 the defender could have been sued at common law. *Vide Black v. Duncan*,

Dec. 18, 1827, 6 S. 261. The above Act only gave effect to this case, and according to a sound construction of the Act the defender was subject to the Sheriff's jurisdiction.

The Lords made *avizandum* with the case.

At advising—

LORD RUTHERFURD CLARK—The question in this case is, whether the Sheriff of Lanarkshire has jurisdiction over the defender by virtue of the 46th section of the Act of 1876? The answer depends on this consideration—whether at the time when the petition was served the defender was carrying on a trade or business and had a place of business within the county. Both elements must concur in order to sustain the jurisdiction.

The defender is judicial factor on the trust-estate of the late Mr Logan of Eastshield. As such he is proprietor in trust of the estate. But it was not contended that he was subject to the jurisdiction of the Sheriff of Lanarkshire by reason of his owning property within the county. The case of the petitioner was laid on the statute.

Mr Logan died in May 1881. It appears that he farmed part of his estate, and also carried on a lime-work situated upon it. Whether he was carrying on a trade or business in the sense of the Act I do not stop to inquire; for we are not concerned with the jurisdiction which the Sheriff possessed over Mr Logan, but with the question whether he has jurisdiction over the defender.

The trustees named by Mr Logan did not accept, or otherwise failed, and the defender, a solicitor resident in Edinburgh, was appointed judicial factor on the trust-estate. He did not carry on the lime-work on the farm. He did nothing more than realise the moveable estate by selling the stock and cropping. He confined himself in the strictest sense to the duties which devolved on him as judicial factor.

I cannot concur that in thus acting the defender can be held to have been carrying on any business. The Sheriff seems to think that as the truster carried on business in Lanarkshire, the defender as his representative "must also be held to do so for the purpose of winding-up." It is quite possible that a representative in order to realise may carry on the business of his predecessor. But to realise is not necessarily to carry on the business. To sell the effects and ingather the debts of a deceased trader is not to carry on his business. If it were so, every representative or trustee of a deceased trader must carry on business—a proposition which in my opinion is not well founded either in fact and law.

The statute is not intended to transfer to a successor any of the qualities which belonged to his predecessor. The jurisdiction is created over the individual himself. It is not confined to any particular estate, but it is universal. Therefore, if the defender was subject to the jurisdiction of the Sheriff of Lanarkshire in this action, he was also subject to the same jurisdiction in any action which might have been raised against him. Hence it follows that the jurisdiction against the defender cannot depend on any representative character which he may possess, but must arise from his own individual position.

Looking to the proof which has been led, I see nothing in it to show that the defender was carrying on business in Lanarkshire when this petition was served on him, or that he had any

place of business there. He did nothing more than sell some effects which belonged to the truster. But I think it would be out of the question to hold that such an act brought him within the statutory category of "a person carrying on a trade or a business." Still less can I see that he had in any sense of the statute, or in any reasonable sense of the phrase, a place of business in Lanarkshire.

In my opinion, therefore, the action must be dismissed.

LORD CRAIGHILL—I concur in the conclusion arrived at by Lord Rutherford Clark, and think it unnecessary to say more.

LORD JUSTICE-CLERK—I also concur, and have only to say that in my opinion if the views expressed by Lord Gifford in the case of *M'Bev v. Knight* are to be followed, they are *a fortiori* of the present case.

LORD YOUNG was absent.

The Lords pronounced this interlocutor—

"Find that the appellant (defender) resides in Edinburgh, and has his place of business and carries on business there, and has not a place of business and does not carry on business elsewhere: Therefore sustain the appeal, recall the interlocutor of the Sheriff, dismiss the petition, and decern."

Counsel for Appellant—Hon. H. J. Moncreiff—Maconochie. Agents—Maconochie & Hare, W.S.  
Counsel for Respondent—Mackay—Baxter.  
Agent—Hector J. M'Lean, W.S.

Saturday, February 25.

## SECOND DIVISION.

HOGGS v. CALDWELL.

(Before Lord Justice-Clerk, Lords Craighill and Rutherford Clark.)

*Landlord's Hypothec—Caution—Relevancy of Defence.*

In a petition for sequestration by a landlord under his right of hypothec, the tenant pleaded in defence that he had not obtained possession of certain adjacent subjects let to him by verbal agreement subsequently to the written lease. *Held* that such an illiquid claim was not a relevant ground of defence.

*Process—Caution for Expenses.*

The Court is always unwilling to compel a defender to find caution for expenses.

This was an appeal from the Sheriff Court of Midlothian in a petition for sequestration by a landlord under his right of hypothec. By written lease dated in 1878 the defender became tenant for a period of seven years of the Beehive Inn, Grassmarket, Edinburgh, at a rent of £200 for the first four years, and £220 for the remaining three years of the lease. By subsequent verbal agreement there were let to the defender two additional rooms and a cellar in Clydesdale Close, upon payment of additional rent of £10 and £6 per annum respectively. Up till Martinmas 1880 the defender paid the stipulated rent.