paid to him. In the disposition Mr Gordon is made a consenting party and co-disponee. That could not do any harm, but the purchase was made from Shaw as proprietor through Messrs Gordon as his agents, and the purchase money was paid to Shaw. In these circumstances it was natural, at least quite intelligible, that a letter should be taken from the Messrs Gordon binding them to show a clear record as at 10th December 1895. That undertaking was clearly as regards Mr Shaw, who bears on the face of the disposition to be the proprietor and disponer. The search showed that the record was not clear, that two inhibitions existed dated in May 1895. Now, it is said, and on intelligible grounds, that the inhibitions are of no use, because Mr Shaw in February divested himself, from a conveyancing point of view, of the property by making a disposition of it in favour of Mr Gordon. It is said that Mr Shaw having divested himself of the property in February, the inhibitions in May were inoperative. But the purchaser has no concern with the relations between Mr Shaw and Messrs Gordon. I give no opinion as to whether the inhibitions, if they were fully investigated, would be found to be operative or not. All I decide is that it is for Messrs Gordon to clear the record. If the inhibitions are easily proved to be worthless, it will be an easy matter to clear the record; if the question as to the validity of the inhibitions is a more serious matter, (and I cannot regard it as other than serious when I find that the Lord Ordinary has decided that the inhibitions are of value) still the obligation to clear the record exists. I am therefore very clearly of opinion that the only result we can arrive at is to affirm the judgment of the Lord Ordinary without entering into any of the questions raised in his judgment in regard to the validity of the inhibitions.

LORD TRAYNER—I am of the same opinion. The action is brought to enforce the obligation contained in the letter of 7th December 1895, in which the defenders undertook to produce searches showing a clear record as at 10th December 1895. That meant a clear record not merely in the property register, but also in the register of personal diligence. The search produced discloses two inhibitions. I am of opinion that whether these inhibitions are valid or invalid, the pursuer is entitled to have the record cleared of them, and that the defenders are bound to clear the record of these inhibitions before their obligation can be held to be fulfilled.

LORD MONCREIFF—I concur. I think it is unnecessary to decide as to the validity of the inhibitions. My judgment proceeds on the letter of obligation. What the title requires is a clear record as to Shaw as at 10th December. By the disposition itself a personal search is required as against W. Shaw, who on the face of the disposition appears as the proprietor, and to whom the price was paid. The defenders cannot be held to have fulfilled their obligations till the record is cleared of these inhibitions.

The Court adhered.

Counsel for the Pursuer — Balfour, Q.C. — Macfarlane. Agents — Macrae, Flett, & Rennie, W.S.

Counsel for the Defenders—W. Campbell — Clyde. Agents — A. & A. S. Gordon, W.S.

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*Saturday, October* 17.

## SECOND DIVISION.

(With Three Judges of the First Division.)

[Lord Low Ordinary.

## CRAIG *v.* HOGG.

*Judicial Factor — Expenses — Personal Liability—Decree for Expenses against a Litigant "as Judicial Factor."*

A judicial factor, who defended an action brought against him in that capacity, was found liable in expenses to the pursuer "as judicial factor." *Held*, by a majority of seven Judges —*diss.* the Lord Justice-Clerk and Lord Trayner—that the decree did not warrant personal diligence against the defender.

*Opinions per* the Lord Justice-Clerk, Lord M'Laren, Lord Trayner, and Lord Moncreiff, that a judicial factor who litigates unsuccessfully is as a general rule personally liable for the expenses of the successful party. *Opinions contra per* Lord Young, Lord Adam, and Lord Kinnear.

On 13th December 1892 James Craig, C.A., Edinburgh, was appointed judicial factor on the estate of the deceased Archibald Rodan Hogg, Solicitor, Edinburgh. The estate consisted chiefly of a claim for repayment of £2026, 8s. 9d. of cash advances made to John Baird, builder, Edinburgh, secured over the reversion of certain heritable subjects conveyed by absolute disposition. This estate the factor was unable to realise so as to yield a surplus to the factory estate.

On 21st April 1893 the Reverend David Nasmyth Hogg raised an action of accounting against Mr Craig as judicial factor, calling upon the latter to exhibit and produce an account of the intromissions of Archibald Rodan Hogg as executor of his deceased brother Dr Robert Hogg, or as vitious intromitter, and craving that Mr Craig as judicial factor foresaid should make payment to the pursuer as one of the next-of-kin of Dr Hogg of £1000, or such other sum as might appear to be the balance due to him, and in the event of the judicial factor failing to produce an account, craving for decree against him as judicial factor of £1000. Mr Craig lodged defences to this action.

On 1st March 1894 the Lord Ordinary (Low) "pronounced an interlocutor decern-

ing and ordaining the defender 'as judicial factor of Archibald Rodan Hogg, to make payment to the pursuer of £159, 6s. 8d., with interest. . . . Finds the defender, as judicial factor aforesaid, liable in expenses to the pursuer.'" *Note*—"There has been some discussion in regard to the terms in which the finding for expenses to which the pursuer is entitled should be made. The action is directed against Mr Craig only in the capacity of judicial factor upon the late Mr Rodan Hogg's estate, and it is not disputed that decree for the principal sum falls to be given against him as judicial factor. He contends, however, that the pursuer should only be found entitled to expenses 'out of the estate' or 'only as an ordinary creditor.' I do not know of any authority for so limiting a finding or decree for expenses. When the pursuer in an action against a judicial factor is found entitled to expenses, the ordinary and proper decree, when it is not intended to make the factor personally liable, is simply against him in the capacity in which he is sued. Mr Craig's object is, of course, to avoid the risk of being compelled in any circumstances to pay the expenses, or any part of them, out of his own funds. I do not think that that is a matter which I can deal with at present beyond expressing my opinion that Mr Craig was without doubt justified in defending the action."

There being no funds belonging to the factory estate in his hands, Mr Craig failed to pay the pursuer either the principal sum or the expenses. The pursuer thereafter extracted the interlocutor, and on 28th May 1895 charged Mr Craig to make payment of £179, 6s. 11d., being the taxed amount of the pursuer's account of expenses, and 19s. 8d., being the dues of extract.

Mr Craig presented to the Court a note of suspension of the charge, and pleaded—"(1) In respect the decree founded upon does not warrant personal diligence against the complainer, he is entitled to suspension. (2) The complainer being liable only as judicial factor, the charge, in so far as directed against him personally, ought to be suspended."

On 10th January 1896 the Lord Ordinary (Low) refused the prayer of the note of suspension.

*Note.*—"The complainer is judicial factor upon the estate of the deceased Archibald Rodan Hogg. The latter had obtained possession of the estate of his deceased brother Dr Hogg, and the respondent, who was also a brother of Dr Hogg, brought an action of accounting against the complainer for the ascertainment and payment of the share to which he was entitled of Dr Hogg's estate.

"Ultimately the amount to which the respondent was entitled was fixed at £159, for which decree was pronounced, and the complainer was found liable in expenses 'as judicial factor foresaid.'

"The estate of Archibald Rodan Hogg seems to have consisted chiefly of a claim for money advanced by him to a builder in Edinburgh, and in security of which a postponed bond was granted in his favour over certain heritable subjects. The security appears to be worthless, and the complainer has been unable to recover any part of the money advanced. He therefore has not, and apparently never had, any estate in his hands as judicial factor, and the respondent has been unable to obtain payment of any part of the sum for which he obtained decree, or of the expenses to which he was found entitled.

"The respondent has accordingly charged the complainer to make payment of the taxed amount of the expenses, and the latter has brought the present suspension of the charge.

"The question is, whether a judicial factor who has no factorial funds is liable for the expenses of a litigation which have been awarded against him only as judicial factor?

"The general rule, which received its latest recognition in the case of *White* v. *Steel*, 21 R. 649, is, that a person put to the expense of vindicating his rights, is entitled to recover that expense from the party by whose opposition it was incurred.

"That rule has been applied in the case of testamentary trustees, of a trustee in bankruptcy, and of a liquidator appointed by the Court under the Companies Acts, and the question is, whether it also applies in the case of a judicial factor or *curator bonis?*

"There are, I think, only two cases in which the liability of a judicial factor or *curator bonis*, who has no estate in his hands for expenses, has been considered, namely, *Forbes* v. *Morrison*, 7 D. 853; and *Ferguson* v. *Murray*, 16 D. 260.

"In the former case Peter Morrison brought an action of reduction of certain deeds, which he had granted on the ground that they had been obtained from him by the fraud of the defenders. After issues had been adjusted for the trial of the cause Morrison became insane, and Forbes having been appointed his *curator bonis* sisted himself as a party to the action, and carried on the litigation, which ended in a verdict for the defenders. In consequence of the verdict the Court assoilzied the defenders and found 'the pursuer liable to the defenders in the expenses incurred by them in this action.'

"Forbes made payment of the expenses to the extent of the funds of his ward, but a balance remained unpaid, and the defenders threatened personal diligence. Forbes accordingly brought a suspension, and the Court held that he was not liable for the balance of the expenses.

"The Lord Ordinary (Cuninghame) seems to have been of opinion that where expenses have been awarded against a *curator bonis* only in his curatorial capacity, he is in no case liable beyond the amount of the estate in his hands. The First Division affirmed Lord Cuninghame's interlocutor, but they appear to me to have proceeded entirely upon the special circumstances of the case. The action had been commenced by the ward before the curator's appointment; if the ward had not become insane, the defenders would have had no security for the ex-

penses beyond his estate; and there was no ground for treating the appointment of a *curator bonis* as giving the defenders additional security, or a cautioner for the expenses.

"The learned Judges, however, recognised that there might be cases in which a *curator bonis* would be personally liable for expenses, Lord Mackenzie instancing the case of a curator who knew that there were no funds out of which expenses could be paid.

"In the case of *Ferguson* v. *Murray* a judicial factor who had unsuccessfully defended an action brought against him in that capacity, was found by the Lord Ordinary, by interlocutor dated 14th June 1853, 'liable in expenses since the date of lodging the defences.' Upon the enrolment of the case for approval of the Auditor's report and decree, the Lord Ordinary pronounced this interlocutor—'Finds that the defender Murray has not by the defences maintained by him in this cause, or by his general conduct in the litigation, subjected himself personally liable in expenses: Approves the Auditor's report upon the pursuer's account of expenses, and in terms thereof decerns in his favour for the sum of £34, 4s. 8d. sterling.'

"Upon a reclaiming-note the First Division pronounced the following interlocutor:—'In respect that the Lord Ordinary's interlocutor, of date the 14th June 1853, in so far as it finds the defender liable to the pursuer in expenses since the date of lodging the defences, did not subject the defender in said expenses personally or at all otherwise than as concluded for in the summons—that is to say, in his judicial capacity as judicial factor or *curator bonis*, and so to have effect primarily against the curatorial estate, the defender being individually answerable only to make such estate forthcoming, or failing thereof to supply any deficiency *prima instantia* from his own funds, he having always relief against the estate: Find that the interlocutor now submitted to review, if intended to go further than said is, was both incompetent and erroneous, and if not intended to go further was unnecessary.'

"That interlocutor is not very happily expressed, but as I read it, it means that if a decree for expenses has been pronounced against a person as judicial factor, and he has no factorial estate in his hands, he must pay the expenses out of his own pocket, and take his chance of operating his relief against any estate which he may afterwards recover. If that is a sound construction of the interlocutor, then it was practically a judgment upon the question which I am now considering.

"Even if the case of *Ferguson* is not to be regarded as an authority upon the question, I do not think that there is any sufficient ground for holding that a judicial factor is in no case subject to the general rule that a person who causes expense to another in establishing a right is liable for the expense.

"A judicial factor, although he is an officer of the Court, does not, except in cases requiring special powers, act under the direct authority of the Court. He can make contracts in reference to the factorial estate, and he is personally liable to perform such contracts, and in suing or defending actions he acts on his own responsibility, and it is he, and not any party whom he represents, who is the litigant.

"No doubt there may be (as in the case of *Forbes* v. *Morrison*) special circumstances which render the general rule as to liability for expenses inapplicable. But here I do not think that there is any special circumstances. The respondent made a claim which proved to be well-founded to a substantial extent against the factorial estate, but the expense which he incurred in establishing that claim was entirely caused by the complainer's opposition. The complainer, upon the other hand, had no funds whatever to meet the claim if it was established, or to pay expenses if his defence should be unsuccessful. In these circumstances I think that the complainer must pay the expenses just as trustees or an official liquidator would be compelled to do under similar circumstances, because, to use the words of Lord M'Laren in his Wills and Successions, ii, p. 1245, 'expenses are not awarded as in the nature of penalty, but as compensation to the successful party for the cost to which he has been put in establishing a right which his opponents ought to have known to be well founded.'

"The complainer argued that to refuse the note would be to find him personally liable in expenses, and that it was incompetent to do so except in the action in which expenses were awarded. I do not regard the question raised here as properly one of personal liability. When a trustee or other person litigating in a representative capacity is found liable personally in expenses, that means that he is liable without any right or relief against the trust-estate or the person whom he represents. Here the complainer was not found personally liable in expenses, and his right of relief against any estate which he may recover remains entire. For the reasons however which I have stated, I do not think that the fact that there is no factorial estate is a good answer to the respondent's claim for the expenses to which he has been put, by reason of the complainer's opposition, in establishing his rights.

"I shall therefore refuse the note."

The complainer reclaimed against this interlocutor, and the case was argued before the Second Division of the Court, who on 27th May 1896 appointed the cause to be re-argued before them and three Judges of the First Division.

Argued for complainer—(1) The judicial factor in this case had acted reasonably in defending the action. He was defender in the action, not the pursuer, and the action had been raised after the death of the principal. No misconduct had been alleged against the judicial factor. The estate under his charge consisted of a valuable asset amounting nominally to over £2000. It might be valueless at present, but if the heritable property rose in value the whole

sum might in time be recovered. The respondent in the present note of suspension had claimed £1000 from the factory estate, and had been found entitled to only £159, 6s. 8d. The judicial factor would have failed in his duty if he had not defended the estate under his charge against this preposterous claim. The Lord Ordinary in the original action had found that the judicial factor was justified in defending it, and he being an officer of Court should not be found liable to personal diligence for expenses incurred by him in defending such an action—*Drummond* v. *Carse's Executors*, January 27, 1881, 8 R. 449; *Young* v. *Nith Commissioners*, July 6, 1876, 3 R. 991, and June 10, 1880, 7 R. 891. A defender was in a different position from a pursuer, and was always looked upon in a more favourable light in a question of this kind—*Lawrie* v. *Pearson*, November 3, 1888, 16 R. 62. There was no case in which a liquidator had been found personally liable for the expenses incurred in an action in which he was called as a defender—Buckley on Companies, 6th ed. p. 273. A judicial factor was in a stronger position than a liquidator or a trustee in bankruptcy, because each of the latter had creditors behind him who could be consulted as to whether he should defend or not. (2) In any event, the complainer had been found liable in expenses "*qua* judicial factor," and could not therefore be liable personally. Judgment could have been pronounced against him either (1) personally, (2) *qua* judicial factor, or (3) *qua* judicial factor and personally. The decree in the Lord Ordinary's interlocutor being against him *qua* judicial factor, both as regards the principal sum and the expenses of process, he could not be charged personally on such a decree. In short, the words of the decree foreclosed any attempt to charge him personally, and the elements of decision being in the original action it was just that this question should be decided there—*Dickson* v. *Bonar's Trustees*, November 20, 1829, 8 S. 99; *Kirkland* v. *Gibson*, December 20, 1831, 10 S. 167; *Kirkland* v. *Crighton*, February 3, 1842, 4 D. 613; *Forbes* v. *Morrison*, June 10, 1845, 7 D. 853; *Kay* v. *Wilson's Trustees*, March 6, 1850, 12 D. 845; *Law* v. *Humphrey*, July 20, 1876, 3 R. 1192.

Argued for respondent—(1) A judicial factor unsuccessfully defending an action was bound to pay the expenses of such an action. This was based upon the principle that any person who resists what turns out to be a just claim against him is always liable to pay the expenses incurred by his unjustifiable opposition—*Kirkpatrick* v. *Douglas*, January 18, 1848, 10 D. 367; *White* v. *Steel*, March 10, 1894, 21 R. 649. This principle ran through all the actions in which ordinary trustees were involved, and as regards that principle a judicial factor was in exactly the same position. Expenses were now not considered to be punitive, they were given to the successful party as a matter of course, and it was no answer for the unsuccessful party to say that he was in the position of a trustee in bankruptcy—*Torbet* v. *Borthwick*, February 23, 1849, 11 D. 694; *Cowie* v. *Muirden*, July 20, 1893, 20 R. (H. of L.) 81, or even of an officer of Court such as an official liquidator—*Liquidator of Consolidated Copper Company of Canada* v. *Peddie*, December 22, 1877, 5 R. 393; *Ferrao's* Case, 1874, L.R., 9 Ch. Ap. 335, or a judicial factor—*Ferguson* v. *Murray*, December 20, 1853, 16 R. 260. No distinction could be drawn between a pursuer and a defender, a defender might elect to defend just as a pursuer might elect to pursue. (2) The circumstance that the finding for expenses was against the defender "as judicial factor" did not exclude personal diligence against him. The Lord Ordinary who pronounced the interlocutor expressly refused to limit the interlocutor so as to find the pursuer entitled to expenses "only out of the estate." The words "as judicial factor" merely defined the character in which the defender was sued, but did not limit his obligation to pay the expenses in an action which he had unjustifiably chosen to defend—*Scott* v. *Patison*, December 21, 1826, 5 S. 172; *Gibson* v. *Pearson*, May 25, 1833, 11 S. 656.

At advising on 17th July—

LORD JUSTICE-CLERK—When this case came before a Bench of three Judges in this Division, there was a difference of opinion, and we thought the question so important that it was desirable it should be heard before a larger Bench, and I am glad that this course was taken in view of what I understand will be the decision of a considerable majority of the Bench which has heard the case of new.

The Lord Ordinary, in the action in reference to which this suspension is brought, was asked by the defender to limit the finding in favour of the pursuer for expenses, to expenses "out of the estate or only as an ordinary creditor." This the Lord Ordinary refused to do. And the finding as to expenses is—"Finds the defender, as judicial factor aforesaid, liable in expenses to the pursuer.

It is contended on behalf of the complainer in this suspension that this finding is equivalent to a finding such as was asked from the Lord Ordinary and refused by him. He further maintains that having been called and having appeared as judicial factor, he is not liable to do more than make the funds in his hands forthcoming, and that if these will not meet the expenses he has caused to the pursuer, the pursuer must suffer the loss.

If these contentions are to receive effect, it must be upon the ground that there is a difference between the case of a judicial factor and other litigants who engage in litigation by either suing or defending as in a fiduciary character, such as testamentary trustees, or trustees in bankruptcy, or official liquidators. If such litigants must make good to a successful opponent the expense he has incurred in litigation, and cannot plead that the fund they hold is exhausted as a ground for resisting payment, is there any ground for holding the position of a judicial factor to be different. It is only different from the case of volun-

tary trustees in this particular, that he is paid for his services, but in what is his position different from that of trustee, voluntary or official, or liquidator, as regards his opponents in the litigation? There are cases which may be held exceptional, such as a *curator bonis* to one insane who cannot obtain any aid by opinion or guarantee from his ward. It seems in one case to have been so held. I take leave to doubt whether the exception so made is sound in principle, but it is certainly not the same case as the present where the factor was truly acting for parties quite able to advise and support him, just as those behind trustees or behind a trustee in bankruptcy, or a liquidator may do.

If this question were to be decided on principle I should decide it as the Lord Ordinary has done. But I hold that there is authority for so deciding it, in the case of *Ferguson* v. *Murray*. I have not, after repeated consideration, knowing that a different view is taken, been able to come to any other conclusion than that the decision in that case established that a judicial factor found liable in expenses must make them good to his opponents by supplying any deficiency of the funds of the factory out of his own funds, he having relief against the estate if from the condition of that estate he can obtain it.

But it is said that the Lord Ordinary by his finding the defender liable "*qua* judicial factor," limited his liability to the funds in his hands. This does not appear to me to be a sound reading of his interlocutor. It has been decided in express terms that a judgment finding a trustee litigant liable in expenses "*qua* trustee," is enforceable to the effect of making him pay the expenses, and I am unable to understand how the exactly corresponding words in the case of a judicial factory should not be read as applicable to the case of the factor in the same way. No cases were cited to the Court showing that in practice such words have been so construed differently from what is done when similar words are used in the case of trustees.

It is true that the Lord Ordinary, who refused to frame his interlocutor so as to limit the pursuer's claim for expenses to the funds in the factor's hands, states that the factor was "justified in defending the action," but if that had been intended as meaning anything more than that as regards the estate he represented he committed no blameworthy wrong in defending the action, then it would, I think, be a contradiction of the Lord Ordinary's judgment in the cause, which held that the defender was in the wrong in the litigation, and that decree must be given in terms of the summons.

I have stated thus shortly why contrary, I believe, to the opinion of the large majority of your Lordships, I am in favour of affirming the Lord Ordinary's interlocutor. I have abstained from going more at length into the question, because I have had an opportunity of reading an opinion prepared by Lord Trayner, in which I desire to express my entire concurrence.

LORD YOUNG—After this case was argued and taken to avizandum in the Second Division, the Judges thought it raised a question of general interest and importance which it was fitting should be decided by a full Bench. It regards the liability of a judicial factor on the estate of a deceased owner for a sum of expenses of process for which he has been found liable "as judicial factor" in an action against him in that capacity by a creditor of the deceased.

The respondent holds decree against the complainer for a debt of £159, 6s. 8d., and also for a sum of £179, 6s. 11d., of expenses of process "as judicial factor" on the estate of the deceased debtor.

With respect to the debt, the respondent admits that the complainer is under no other obligation to him than to treat him as a just creditor and claimant to the amount of it on the factorial estate. But with respect to the expenses of process he contends that the complainer's obligation is not thus limited, but that by force of the decree he is personally bound to him as debtor therefor, or as cautioner and surety for the sufficiency of the factorial estate to meet them in full.

The complainer disputes this contention, and maintains that as regards his obligation or duty to the respondent, there is no distinction between the debt and the expenses of process.

Proceeding on the view which he takes of his right, the respondent charged the complainer personally on the decree for expenses in order to do diligence for the attachment of his private property, and the question before us arises in a suspension of the charge.

The decree, on which alone any liability of the complainer to the respondent stands, makes no distinction between the debt and the expenses of process, declaring in terms that his liability for both and each is "as judicial factor." I am unable to regard these words as superfluous and unmeaning, or otherwise than as distinct and intelligible words of limitation, operating alike on the liability for the debt and for the expenses. Now what is that limitation? I have characterised it as, in my opinion, distinct and intelligible, thinking it clearly imports that the complainer is not by the decree thus qualified made the respondent's debtor, or the respondent his creditor for the sums specified, but is only ordered to treat the respondent as having a good claim on the factorial estate for these sums.

It is, I think, not doubtful that a judicial factor, although sued and concluded against only as such, may competently be found liable and decerned against in such manner as to subject him personally in immediate and direct liability, at least for expenses of process, so that diligence therefor may be done against his private property, and all that I mean by what I have already said is that this is not done by finding him liable and decerning against him "as judicial factor."

It was contended on the part of the respondent that a judicial factor sued as such by a claimant on the estate committed to his charge, and defending the action, is in the same position with respect to liability for costs as a party defending an action directed against himself personally; that costs ought in both cases alike to follow the result, and with the personal liability therefor of the losing party.

I think this contention is based on a misapprehension. It is true that costs as a rule follow the result in this sense—that they are not given or withheld only according as the Court is of opinion or not that the unsuccessful action (or defence) was reasonable and therefore excusable although unsuccessful. In this, the only reasonable sense of the rule, it is applicable to an action properly brought to establish a claim against a factorial estate so that the successful pursuer of such action will, unless under exceptional circumstances, have decree against his debtor (the factorial estate) not only for the debt which he has established, but also for costs, although the Court should be of opinion that the defence by the factor officially representing the estate was "undoubtedly" reasonable. The rule in this sense—and I can take it in no other—was acted on in the respondent's favour when in his action he got decree for his costs in the same terms as for his debt, although the Court was of opinion that the defence "was without doubt justified." But the question regarding the factor's liability, the only question of importance here, involves quite other considerations. Irrespective of the decree the relation of debtor and creditor does not and never did exist between the complainer and respondent, and by the decree the complainer is made debtor in no other sense or capacity for the costs than for the debt found to have been due by the deceased owner of the factorial estate.

The respondent had no living debtor when he raised his action, and has none now unless the decree creates one, which I think it clearly does not. His only debtor died in 1890, and no representative of his with a passive title—that is to say, liable for his debts—exists or ever existed. A judicial factor has no passive title to make him debtor to the creditors on the factorial estate, and when an action is brought against him as such it is to establish an alleged debt not against him but against the estate. It is not doubtful that the debtor for costs awarded to a successful claimant on the estate is the estate itself, which must accordingly be administered by the factor with a view to meet them as a proper claim upon it. It would be absurd to contend that under such a decree as we have here to deal with the estate is not liable, and that the successful pursuer can only claim the costs from the individual factor who unsuccessfully defended the action. The personal liability sought to be imposed on the factor is therefore in truth that of a cautioner or surety for the sufficiency of the estate. That such liability may be imposed must, I think, be admitted when the Court is of opinion that the factor has been guilty of some misconduct—some violation or neglect of duty—which warrants it. But the idea of this Court putting such cautionary obligation on its own officer who has only done his duty without violating or neglecting it in any respect is, I think, abhorrent to reason and justice.

A judicial factor on the estate of a person deceased is, as I have already said, not debtor to that person's creditors, owes them nothing, and is under no duty to them, except an honest and intelligent performance of the duties of his office. These duties he owes to all without distinction who are interested in the factorial estate. It may be, or not, according to his duty to resist individual claims on the estate, and to require that they shall be judicially established before he admits them. If he fails in this duty, violates or falls short of it, by resisting any claim which he ought in the due discharge of his duty to have admitted, or by admitting and satisfying any claim which it was his duty to resist, he may incur personal responsibility and consequent liability to any sufferers or sufferer by his misconduct. Whether by resisting any particular claim—that is to say, defending an action brought to establish it—he has acted according to his duty or in violation of it, is a question to be determined in the action itself, and the determination of it unfavourably to the judicial factor may lead to his being subjected to personal liability for the costs thereby occasioned to the claimant. But the proposition that a judicial factor cannot in the due and proper discharge of his duty defend an action without incurring the risk of such personal liability, and being actually subjected to it if the pursuer establishes his claim, is one which I must reject.

I can pay no attention to the imputations of the respondent in his answers, because it is, I think, the reasonable and settled rule that any misconduct or breach of duty by a judicial factor warranting the imposition of personal liability for costs, must be found by the Court in the action in which the costs are awarded, while in that action here the Court (Lord Low) not merely found nothing amiss in the factor's conduct, but distinctly expressed the opinion that "he was without doubt justified in defending the action," and I may here remark that if the complainer "was without doubt justified in defending the action," he was "without doubt" entitled to pay his own expenses out of the estate, though the consequence might be to leave nothing to pay the debt for which the respondent holds decree. To say that he is nevertheless personally bound as cautioner for the costs given to the respondent by the same decree and in the same terms seems extravagant.

It was suggested and urged in argument that while on the one hand justice to the successful pursuer to whom costs are awarded, requires that the judicial factor shall pay them, as cautioner for the estate, on the other no injustice is thereby done to the factor, because he always may, and in

prudence ought to, protect himself against the consequences of such cautionary liability by consulting those who are beneficially interested in the estate, and procuring their obligation to protect him against the consequences before taking the position of defender in the action.

I am altogether adverse to this view. In the first place, the pursuer's debtor and only debtor is the factorial estate, which in his interest and that of all others having claims on it, has been placed under judicial management. The judicial manager is in no sense whatever his debtor, and in the action is not called as his debtor but only as manager and administrator of the estate which is. It is hardly worth saying that a successful pursuer thinks it hard when he finds that his debtor is unable to pay his debt and costs. The case is familiar enough, and the law certainly does not protect any pursuer against it by giving him a cautioner for his debtor's ability to pay. In the second place, I cannot countenance the notion that a judicial factor who is honestly and on reasonable grounds of opinion that it is according to his duty to resist a claim on the estate unless it shall be established to the satisfaction of the Court whose officer he is, ought, before defending an action brought to establish it, to consult those interested in the estate, and obtain their approval and also pecuniary obligations from them for his protection. I must say that I think such a proceeding is of questionable propriety, but apart from that, it is one which in many, I should think in most cases, is impracticable. Further, regarding this suggestion of the possibility of obtaining an obligation of indemnity as an answer to the argument based on the manifest injustice of putting a cautionary obligation on an unoffending judicial factor, I am not influenced by it. For why should an unoffending factor who is honestly and intelligently doing his duty, be put to look out for and take obligations of indemnity against risk? And what is the character of the obligations which it is thought he may get, and ought for his safety to take before acting according to what he rightly believes to be his duty? Is it a written bond of caution for expenses of process to be substituted for the liability which *ex hypothesi* the law imposes on himself, and which his opponent in the action must be content with? or a bond of relief, on receiving which he must be content to take the risks or otherwise decline to perform what he believes to be his duty?

Small at the best, and possibly uncertain as the estate committed to the factor here was, we must assume that this Court was judicially satisfied that it was such an estate, and that the interests in it were such as to make it proper that it should be committed to the charge of a judicial factor with the duty of managing and administering it as should in his judgment be best in the interests of all concerned; and we must further assume that the person appointed to the office was so only after the Court was satisfied of his fitness. We may now have a petty case to deal with, but in considering a general question we must disregard that detail. A factorial estate may be of any value, and of any degree of certainty or uncertainty of realisation, having regard to its character and investments. Farther, the interests in it and the claims upon it may be of any character and of any extent. Now, the factor is charged with the care and protection of the estate in the interests of all alike, and a very conspicuous part of his duty, in the common interest, is to protect the estate against claims which are not established to his satisfaction, and the establishment of which may cause expense to the claimants or the estate. This duty involves the exercise of judgment, and I should have thought it clear, on the one hand, that he is bound to exercise his judgment honestly and intelligently, and on the other, that no more can be required of him. It is in the common interest that he shall exercise it without favour and also without fear. Now, consider the position in which he would be placed, and the risk to which the interests placed in his charge would be exposed if the law were that if he resisted any claim, although of a character which he was "undoubtedly warranted" in resisting, he must become personally cautioner to the claimant for the expenses of process. I think this is not a position in which anyone ought to be placed who is required to exercise a disinterested judgment, for it is a position which gives him an obvious personal interest and bias in one direction.

The case may be rare—I hope it is—when an estate which this Court has thought fit to commit to a judicial factor turns out to be so worthless as that here in question seems likely to do, but we must, as I have said, deal with the question before us and the considerations of reason, justice, and expediency bearing on it, as they may occur in any reasonably supposable case. Now, an apparently large factorial estate may be wholly lost without any fault on the part of the factor, as by sudden failure of securities, or the success of a claimant on an outside title to what had long been regarded as part of the estate. To put the judicial factor in the position of cautioner for the estate's sufficiency to pay costs, possibly of large amount, may therefore be a very serious matter indeed. A proper litigant must undoubtedly take the risk of the law's uncertainty, or rather perhaps the uncertainty of judges and judgments. But to put such risk on a judicial factor with respect to the ultimate result in the law courts—it may be in the Court of last resort—and with much and reasonable difference of opinion, on a question in the decision of which he has no interest whatever, but only a duty to see that it is regularly and properly tried, is a quite different thing.

If any claimant on a factorial estate who brings an action against it—for such action must, as I have said, be regarded as brought against the estate, the pursuer having certainly no other debtor—ought to be dealt with so exceptionally from other

pursuers, that caution for expenses must be given as the condition of a defence being allowed, it is difficult to see why he should be bound to take the caution of the judicial factor. But why he should have any caution I cannot conceive. He gives none himself, and no other pursuer or defender does, but takes the risk of his debtor being able to pay what may be found owing and decerned for.

I have specially dealt only with the case of a judicial factor defending an action brought against him as such, and which resulted in a decree in the terms of that before us, and certainly the case is the strongest for the application of the views which I have expressed. At the same time I think it right to say that my opinion extends to the case of a judicial factor who in the due performance of his duty makes a claim on behalf of the estate and raises action to establish it. I see no reason why the pursuer (the estate) should find caution for expenses, or why the obligation of a cautioner should be put on the factor as a condition of his performing his duty, which is, I assume, to institute and pursue the action.

I also think it right to say that the considerations, with their result, which I have expressed and endeavoured to illustrate, apply, or may apply (for there may be exceptional cases), to trustees including executors, and generally to anyone holding an office involving duties to others whose common interests the law has placed in his charge, and involving no interest on his own part except the faithful and intelligent performance of these duties.

I stated in the outset of these observations that the qualifying and limiting words "as judicial factor" in the decree against the complainer are, in my opinion, inconsistent with the personal liability which the respondent contends for, and this opinion, if sound, is enough for the decision of the case. It was suggested in the argument for the respondent that Lord Low, who pronounced the decree, must have intended personal liability, seeing that he has refused this suspension to resist it. But I think it clear enough from his Lordship's notes that he had no intention of imputing misconduct to the complainer, and, on the contrary, was judicially satisfied that he had acted according to his duty, although he was nevertheless of opinion, in point of law, that personal liability attached to him. I have stated fully my reasons for differing from this opinion. Had there been grounds for thinking that his Lordship meant to impose personal liability because of any misconduct which would warrant it, I should not merely have regretted the inaccurate (in that view) language of the decree, but felt disposed if possible to overcome it.

It is important that there should be no doubt as to the meaning and effect of these qualifying and limiting words "as judicial factor," or "as trustee" or "as executor," or as to the grounds on which they ought to be used or avoided, and others importing personal liability employed. This must be my excuse for entering so fully into the subject, and was indeed the reason which induced the Second Division to refer the case to a full bench.

With respect to the authorities to which we were referred, I have to say, first, that I am unable to accept the decision in *Gibson*, May 25, 1833, 11 S. 656, as an authority. It has never since been followed, and the practice of the Court, so far as my experience goes, has been at variance with it. Second, I think the decision and the opinions expressed in *Forbes* v. *Morrison*, 7 D. 856, are in accord with the views which I entertain and have expressed. Third, I think the case of *Ferguson* v. *Murray*, 16 D. 260, is not in point. Fourth, the most recent case, *Law* v. *Humphrey*, 3 R. 1192, and the opinion of the Lord President concurred in by all the Judges, are entirely in accord with the views which I hold. Fifth, in the English case—*in re Bolton & Company* (*Salisbury, Jones, and Dale's* case, January 11, 1895, 1 Chan. Div. 333)—which was not cited to us, the Court proceeded on the same view, adverse to the personal liability of a trustee who has been guilty of no misconduct or failure in duty.

Lord Adam—I think it is clear that all questions of expenses as between the parties to an action must be determined in the action in which they are incurred. I think it is quite incompetent to inquire in this case whether or in what capacity the complainer should have been found liable in expenses in the original action.

It appears to me, therefore, that the only question we can competently consider in this suspension is, what has the Lord Ordinary decided as to the expenses in that action, and in that matter the interlocutor or decree must speak for itself. We cannot go to the Lord Ordinary's opinion to see what meaning he intended that the interlocutor should have. Third parties, messengers-at-arms, for example, or arrestees and others interested, have no access to such sources of information, and the interlocutor must have effect according to its legal meaning and construction, whatever that may be.

Now, the Lord Ordinary has in the original action ordained the complainer, as judicial factor, to make payment to the respondent of a principal sum of £159, 6s. 8d. with interest, and has found him "as judicial factor foresaid" liable in expenses to the respondent.

The question is, whether by the finding expressed in terms used, the complainer is bound to make payment of these expenses personally out of his own pocket or only out of the factory estate.

Now, as I have stated above, the complainer has been ordained to pay a principal sum of £159, 6s. 8d. as judicial factor. I have not heard the respondent or anybody else suggest that the complainer is personally liable to pay that sum, or that the words used do not aptly express the intention of limiting liability to the factorial estate.

I can only say that throughout my long experience I have always understood that

the words "as judicial factor or *qua* judicial factor" when used as here, were intended to limit liability to the factorial estate, and I have always so used them. But if that is their undisputed meaning when used in this interlocutor in connection with the principal sum, how can it be maintained that they are not to have the same meaning when used in connection with the finding as to expenses. I cannot read the interlocutor as if no such words were in it, or as if it found the judicial factor personally liable. To my mind the construction of the interlocutor is clear, and it imposes on the complainer no personal liability for expenses.

I do not think that we have to consider what would be the effect as regards liability for expenses of an interlocutor finding the defender liable in expenses without qualification, or whether, as regards such liability, judicial factors or other officers of Court are in a different position from trustees in bankruptcy. But as the question has been argued to us, I may say that I concur with Lord Young on that matter. I think that if it is intended that such officers are to be personally liable in expenses to the opposing litigant, it should be expressly so found.

On the whole matter I am of opinion that the interlocutor of the Lord Ordinary is wrong.

LORD M'LAREN — Two questions were argued at the last hearing of the clause—(1) Assuming that the Lord Ordinary's interlocutor in the action at the instance of the present respondent leaves open the question of the liability of the judicial factor, what is that liability? (2) Is this question left open, or is the suspender only liable for expenses in his representative capacity?

(1) On the first of these questions I shall say very little. I hold it to be settled in practice and clear in principle that in questions of expenses trustees are principals, and this on the ground that whoever opposes a just claim is liable to compensate the claimant for the expense to which he has been put in vindicating his claim. But this is not an absolute rule. One familiar exception is the case of litigation as to rights under a deed where the difficulty is caused by the obscurity of the deed. Now, in all cases where the Court has a discretion as to costs, I should be disposed, in exercising that discretion, to consider favourably the case of trustees who are defending the interests of minors, or insane or absent persons, but where the question does not come within the region of discretion, I think that trustees must be liable for costs like other people, and this without reference to the character or purposes of the trust.

I have intentionally put the question as one of trustee liability, because it so presents itself to my mind. A judicial factor is for all practical purposes a trustee. It has repeatedly been observed that the reason for appointing judicial factors to administer trusts (rather than new trustees) is that the accounts of the former are audited under judicial supervision, while the latter are not directly responsible to the Court. But now that trusts may be brought under judicial supervision, the distinction is seen to be unsubstantial. I am unable to admit that the Court has the power to award to its officers a privilege of litigating without liability for expenses that is not shared by private trustees.

(2) The view which I take on the second question would (if I were sitting alone) make it unnecessary to consider the first. I think that the question whether a trustee or judicial factor is to be made liable in expenses individually or only in his representative capacity is a question that ought always to be decided in the original action. If the decree is simply against the "pursuer" or the "defender," I should understand this as meaning that the individual decerned against must pay the expenses, reserving his claim to be indemnified out of the trust-estate—a claim which, of course, cannot be determined one way or the other in an action to which beneficiaries are not parties. In the present case the interlocutor in the original action, which is the warrant of the decree, ordains Mr Craig "as judicial factor of Archibald Rodan Hogg," to make payment to the pursuer of £159, 6s. 8d. with interest, and also finds the defender, "as judicial factor foresaid," liable in expenses to the pursuer. It is not disputed that the decerniture for principal and interest due under the account sued for is a decerniture against Mr Craig in his representative capacity, and it follows in my opinion that an award of expenses, qualified in identical terms, must be read subject to the same limitation.

In so reading the decree we are not, as I conceive, laying down new law. So long ago as 1842 the meaning of an obligation undertaken by obligants "as trustees" was determined by the House of Lords. I refer to the case of *Gordon* v. *Campbell*, 1 Bell's Appeal Cases, 428. This case arose out of a charge given on letters of horning to enforce payment of principal and interest under a bond granted by the suspenders "as trustees." The chargers had intimated their intention of following out the charge by a caption, and a suspension was brought on the ground that the suspender was not in the possession of trust funds to meet the claim. The Lord Ordinary, Lord Moncreiff, found "that there was no legal warrant in the heritable bond and disposition on which the letters of horning were issued for charging the suspender as on personal diligence for payment of the debt in question as due by him personally and individually," and therefore suspended the charge. To this interlocutor the Lords of the Second Division adhered, and their judgment was affirmed on appeal. This decision has been accepted and acted on as the charter of limited liability for trustees and representative persons in all cases where the parties to a contract are free to contract on such terms. In his judgment in *Muir*, 6 R. (H.L.) 21, the case is examined by Lord Cairns and approved, and his Lordship went so far as to say that in such a case, where there is authority to accept a contract so limited, "the words used could have no meaning, and could be

referred to no object other than that of limiting responsibility."

I think it would be unfortunate if it should be held that an obligation constituted by decree in language which *ex facie* imports a limited responsibility has a different meaning from that which has been attached to the same words when used in a voluntary deed of obligation, and I see no reason for the suggested distinction. I think that as the chargers state their intention of using the charge so as to affect the private estate of the judicial factor the charge ought to be suspended.

LORD KINNEAR—I agree with the opinion of Lord Young both (1) as to the construction and effect of such an interlocutor as that pronounced by the Lord Ordinary, and (2) on the general principle which ought to guide the Court in deciding whether a judicial factor should be liable personally or in his factorial capacity. My reasons for doing so have been stated so fully and so clearly by his Lordship, that I do not think I would be justified in occupying the time of the Court by repeating them.

LORD TRAYNER—The general rule of our practice is that an unsuccessful litigant is found liable in the expenses of the action in which he has unsuccessfully maintained a claim or a defence. I say either claim or defence, because in my opinion it makes no difference in the question of liability for expenses whether the unsuccessful party has voluntarily come into Court to pursue a claim which he has not been able to establish, or has been called into Court and stated a defence which has been repelled. If the general rule, as I have stated it, is applied in the case before us, the suspender (defender in the action in which expenses were decerned for) is bound to pay these expenses, and his suspension of the decree against him should be refused.

But the suspender maintains that the general rule is not applicable to his case (1) because he was called and appeared in his character of judicial factor merely, and that a judicial factor is not liable for expenses if he has no factorial funds in his hands, and (2) because in any view the terms of the decree pronounced against him being against him *qua* judicial factor, limit his liability to the amount of the factorial estate in his hands.

On the first point my opinion is adverse to the contention of the suspender. That he was called to the action and defended it as judicial factor does not in my opinion hinder in the least the application of the general rule as to liability for expenses, and I think there is neither authority nor principle for giving effect to the exception for which the suspender contends. Called to the action as judicial factor he appears in it in his official capacity—that is, a representative capacity—he represents the factorial estate. Does that fact relieve him from liability for expenses? If it does, then a judical factor is more favoured than other litigants who appear as representatives of interest other than their own. Testamentary trustees suing or being sued as such in matters connected with the trust estate under their care are liable in expenses to their successful opponent, and must pay such expenses whether they have trust funds in their hands or not. So also, a trustee in bankruptcy, suing or being sued in reference to the sequestrated estate, is liable to his successful opponent in expenses, and (as has been decided in express terms) it is not a relevant answer to a charge for such expenses to say that he has no funds belonging to the sequestrated estate. There is no such difference between a judicial factor and testamentary trustees or a trustee in bankruptcy as to make it necessary, expedient, or right that one rule should be applied in his case different from the rule applied in theirs. Indeed, a judicial factor is in very many cases, if not in all cases, practically a trustee in bankruptcy or a testamentary trustee. He either represents beneficiaries like a testamentary trustee, or creditors like a trustee in bankruptcy. In the present case it appears from the statements of the parties that the suspender is acting chiefly in the interests of creditors, and he is therefore as I have said in the same position as a trustee in bankruptcy. It can make no difference in the question of his liability for the expenses of an unsuccessful litigation that he is called a judicial factor and not a trustee, or that he acts under an extracted appointment made by the Court instead of under an act and warrant by the Court confirming an appointment made by creditors. That being so, it appears to me to have been decided that it is no relevant answer for this suspender to make to the charge served upon him, that he has no trust or factorial funds in his hands to meet it. In giving this opinion I am not forgetting that it was said in the case of *Forbes* v. *Morrison*, that the position of a trustee in bankruptcy is very different from that of a *curator bonis*. This difference is strongly asserted, but the only reason assigned for the difference seems to me, if I may with deference say so, quite inadequate. The reason was that a trustee in bankruptcy had always the creditors on the estate behind him, to give him both advice and instructions as to whether he should *qua* trustee embark on a certain litigation; that he acted as mandatory for the creditors, whereas the *curator bonis* in the case cited (he was curator to an insane ward) could not from the very circumstances of his position consult with the ward whose interests were involved in the litigation. Now, I cannot help thinking that this peculiarity in the position of the *curator bonis* had a good deal to do with the judgment arrived at, which it may be thought, showed more consideration for the difficult and embarrassing position of the *curator bonis* than for the just claims of his opponent. The difficulty of the curator's position was his misfortune, but why should that prejudice his opponent? But while I can see no difference in principle as regards liability for the expenses of an unsuccessful litigation between a *curator bonis* and a trustee in

bankruptcy, both litigating in a representative capacity and in interests other than their own, I am not concerned for the purposes of this case to deny that such a distinction may exist. For the distinction, at least the reason assigned for the distinction, cannot avail the suspender. He had behind him both creditors and beneficiaries with whom he might have consulted before litigating with the respondent, and in that respect was not different from a trustee in bankruptcy. But as a trustee in bankruptcy would undoubtedly have been personally liable *prima instantia* for the expenses of an unsuccessful litigation, so should the suspender be liable, between whose case and the trustees no real distinction can be drawn.

It is not, however, necessary to determine the question before us upon principle, for in my opinion it is already determined by authority. I refer to the decision in the case of *Ferguson* v. *Murray*. Some observations have been made upon the interlocutor in that case, to the effect that it is complex and involved, if not unintelligible. I have not experienced any difficulty in understanding that interlocutor, the language and meaning of which seems plain enough; and it is just worth noticing in passing that that interlocutor was pronounced by the First Division of the Court at a time when that Court was composed of Judges whose opinions have always been regarded by the profession as entitled to more than ordinary respect. In that case the Lord Ordinary found "the defender" (who was a judicial factor and called as such) liable in expenses to the pursuer. The Court held that that finding imported that the defender was bound to pay the expenses found due primarily out of the funds in his hands as factor, and failing thereof "to supply any deficiency *prima instantia* from his own funds, he having always relief against the estate." That expresses exactly what I think should be done here; it is what the Lord Ordinary has done in the interlocutor now under review.

On the second point maintained by the suspender, I am also adverse to him. It is said that the Lord Ordinary by finding (in the original action) the defender *qua* judicial factor liable in expenses, limited the defender's liability to the extent of the factorial funds in his hands. The Lord Ordinary certainly did not intend to do so, for he expressly refused to insert in his interlocutor any finding so limiting the defender's (suspender's) liability although moved by the defender to do so. Nor do I think the Lord Ordinary did by implication what he refused to do *per expressum*. The words *qua* judicial factor appear to me to be words merely of description, not words of limitation. This view is also supported by authority. In the cases of *Scott* v. *Pattison* and *Gibson* v. *Pearson* the defender was found liable "*qua* trustee," and in both of these cases the contention that such words limited the defender's liability to the funds in his hands as trustee was repelled, the Court holding that the defender under such a decree was bound *prima instantia* to pay the expenses found due to his opponent, leaving him thereafter to operate his relief against the estate he was administering. If a decerniture "*qua* trustee," or "as trustee," was so interpreted, I cannot see why the same interpretation would be objectionable if put upon the words "*qua* judicial factor."

It has been remarked upon that the suspender did not wrongfully enter upon the litigation on which he was found liable for expenses, and the Lord Ordinary' observation has been quoted that he was "without doubt justified in defending the action." It is not quite clear to my mind what bearing that observation has on the present question. The Lord Ordinary could not mean to say that the suspender was justified in defending the action" as in a question between him and the pursuer of the action. If that had been the Lord Ordinary's meaning he would necessarily have found the suspender entitled to expenses, not liable in them. If, however, the Lord Ordinary meant (as I think he did) that the suspender's conduct, as in a question with the estate he represented, was justified, I have no reason to doubt the justice of the statement, but it is of no importance here. The suspender could not be justified in opposing the respondents' demand, for his opposition was held to be ill-founded, and decree went against him. As in a question with his opponent, an unsuccessful litigant is never justified in his opposition, and cannot be, for being unsuccessful he is held to have been wrong. But to prevent any misunderstanding as to my own view on this matter, I must add that I could not hold any judicial factor justified in entering into a litigation who had no funds or estate whatever belonging to the factory in his hands, and no reasonable prospect of ever getting any, which was the case here.

I am of opinion that the judgment of the Lord Ordinary should be affirmed.

LORD MONCREIFF—What we have to decide in this case is, whether the decree for expenses granted by Lord Low in the previous action between the parties does or does not warrant personal diligence against the complainer. That question must be determined according to the legal construction of the decree, and the finding as to expenses upon which it proceeds which is contained in Lord Low's interlocutor of 1st March 1894. If properly construed, the decree warrants personal diligence against the complainer, and this suspension must be refused. We cannot in this process determine whether in the circumstances the complainer should or should not be held personally liable; that is a matter which must be held to have been decided in the original process.

The question in my opinion—the only question—which it is necessary to decide is, whether the decree, according to its terms, imposes personal liability for expenses on the complainer? I agree with those of your Lordships who hold that it does not, because the complainer was found liable in

expenses "as judicial factor," and not as an individual. These are limiting words; their natural and legal signification and effect is to restrict the decree to one against the party in a representative capacity.

The case of *Gordon* v. *Campbell*, June 13, 1842, 1 Bell's App. 428, is a strong authority as to the restrictive effect of such words. Although in that case the words "as trustees" occurred in a heritable bond, and not in a decree, the question was really the same as in the present case, (the registered bond being a good warrant for letters of horning), viz., whether an obligation undertaken "as trustees" warranted personal diligence against the parties to the bond. It was pleaded for the charger (p. 543) that the words "as trustees" were used to describe the character of the parties, and not to limit their liability, just as in this case it is pleaded that the words "as judicial factor" were used in the summons and the decree simply to describe the character in which the complainer was sued. But this argument was disregarded. It may be observed that this judgment of the House of Lords was subsequent in date to the case of *Gibson* v. *Pearson*, 11 Sh. 656, and the earlier case of *Scott* v. *Pattison*, 5 Sh. 172 (relied on by the respondent), the first of which at least was relied on by the appellant in *Gordon* v. *Campbell*.

Later cases cited for the complainer—in particular, *Kay* v. *Wilson's Trustees*, 12 D. 845, and *Davidson's Trustees* v. *Carr*, 12 D. 1069—show that where it is intended that in the event of the trust or factory estate proving insufficient, the trustee or factor shall be personally liable to make good the deficiency, this should be expressly stated in the decree.

I do not proceed upon the ground that in the summons the pursuer concludes for expenses against the defender "as judicial factor," because in dealing with expenses the Court are in use to disregard such a limitation. What I do proceed upon is, that in his finding as to expenses, the Lord Ordinary finds the defender liable only "as judicial factor." He says—"Here the complainer was not found personally liable for expenses, and his right of relief against any estate which he may recover remains entire." But he seems to have thought that a personal decree is required only when it is intended to deprive the factor of his relief against the estate; and that in order to render the factor personally liable to the successful litigant, it is not necessary that he should be decerned against personally. In this I do not agree with him.

I may add that it is not disputed that an earlier part of the decree, viz., that in which decree is given for the principal sum of £159, 6d. 8d., and in which the same words "as judicial factor" are used, does not warrant personal diligence against the defender. It would be confusing and inextricable if the same words were held to bear a different signification in two parts of the same decree.

In what I have said I have assumed, as I think the Lord Ordinary has assumed, that there are no trust funds out of which the expenses can be paid. If this is admitted, I think the charge should be suspended.

In the view which I have stated it is not necessary to consider the general question which was argued to us as to the personal liability of a judicial factor for expenses when the factory estate proves insufficient.

I may say, however, that as at present advised, I am not prepared to affirm that as a general rule a judicial factor who litigates unsuccessfully is not personally liable for the expenses of the successful party. Assuming, as I do, that a testamentary trustee is personally liable for such expenses as a general rule, I do not think that there is any solid distinction between the position of a judicial factor and that of a testamentary trustee. The factor has as good means as the trustee of knowing the amount of the funds at his disposal, and of obtaining legal advice, and consulting the beneficiaries or creditors interested. If there is a distinction, it is against the factor, because he is paid for his services and the trustee is not.

I do not think that much aid is to be derived from the judgment of the Inner House in the case of *Ferguson* v. *Murray*, 16 D. 260. I confess that I read that judgment in the same way as the Lord Ordinary and the Lord Justice-Clerk and Lord Trayner; but it admits of being read, and has been read in a different sense, and no reasons are given in the report to aid us in construing it. Leaving out of view this doubtful authority, it is a point in favour of the complainer that there is no express decision against his view. It must be remembered, however, that the law as to the liability of parties suing or being sued in a representative capacity, has matured slowly, if indeed it has matured, and that even as regards the liability of testamentary trustees the decisions up to a recent date are by no means consistent.

But for reasons which I have already stated I think that we should not in this process attempt to lay down any general rule on the subject.

On the whole matter I am of opinion that the Lord Ordinary's interlocutor should be recalled and the charge suspended.

On 17th October the Court pronounced the following interlocutor:—

> "The Lords of the Second Division along with three Judges of the First Division having heard counsel on the complainer's reclaiming-note against Lord Low's interlocutor of 10th January last, in conformity with the opinions of the whole Judges present at the hearing, Recal the interlocutor complained against: Sustain the first and second pleas-in-law for the complainer: Suspend the charge and whole grounds and warrants thereof, and decern."

Counsel for the Complainer—Lees—A. S. D. Thomson. Agent—Marcus J. Brown, S.S.C.

Counsel for the Respondent—D.-F. Asher, Q.C. — Clyde. Agent — J. Smith Clark, S.S.C.