corresponding taxed fees of the Auditor, but there fell to be deducted the one-fourth of modification, viz., £13, 15s. 5d., leaving £41, 6s. 2d.]

Counsel for the Pursuers (Respondents and Objectors) — Morison, K.C. — Black. Agents—Webster, Will, & Co., S.S.C.

Counsel for the Defenders (Reclaimers)— Murray. Agents — Alexander Morison & Company, W.S.

Saturday, June 1.

FIRST DIVISION.

[Sheriff Court at Glasgow.

MORRISON *v.* VALLANCE'S EXECUTORS.

Process — Citation — Registered Letter — "Last Known Address"—"Legal Domicile or Proper Place of Citation"—Service by Registered Letter Addressed to a Defender Known to be Furth of Scotland at his Last Known Address being the Pursuer's House—Citation Amendment (Scotland) Act 1882 (45 *and* 46 *Vict. c.* 77), *sec.* 3 — *Act of Sederunt, December* 14, 1805, *sec.* 1.

In an action in the Sheriff Court in 1893, by a sister against a brother who had lived in her house but had left, not forty days previously, to go to sea as a doctor, service was effected by registered letter addressed to him there as his last known residence. The pursuer took in the letter and alleged that it was forwarded to the defender, but its receipt by him was not proved. Subsequently the pursuer obtained decree in absence, and on the brother's death in 1906 she claimed on his estate. His executors had themselves sisted as defenders in the action, and reponed against the decree. They pleaded that the proceedings were void on the ground of incompetent service.

Held that the pursuer was barred by her actings from pleading that the citation was good under the Citation Amendment (Scotland) Act 1882, sec. 3.

Opinion by the Lord President, preferring the dictum of Lord President Robertson in *Corstorphine* v. *Kasten*, December 13, 1898, 1 F. 287, 36 S.L.R. 174, to that of Lord Jeffrey in *Brown* v. *Blaikie*, February 1, 1849, 11 D. 474, to the effect that after a person goes from his last known place of residence in Scotland his domicile of citation remains for forty days at that residence.

Process — Citation — Defenders Appearing but Objecting to Citation — Executors Objecting to Citation on Deceased — Sheriff Courts (Scotland) Act 1876 (39 *and* 40 *Vict. c.* 70), *sec.* 12, *sub-sec.* 2.

The Sheriff Courts (Scotland) Act 1876, sec. 12, enacts — "With regard to writs issuing from the Sheriff Courts the following provisions shall have effect. . . . (2) A party who appears shall not be permitted to state any objection to the regularity of the execution or service as against himself of the petition by which he is convened."

Held that executors of a deceased defender against whom decree in absence had gone out, having had themselves sisted as defenders and reponed against the decree in absence, were entitled to plead that the service had been irregular and the proceedings therefore void.

The Citation Amendment (Scotland) Act 1882 (45 and 46 Vict. cap. 77), sec. 3, enacts— "In any civil action or proceeding in any court or before any person or body of persons having by law power to cite parties or witnesses, any summons or warrant of citation of a person, whether as a party or witness, or warrant of service or judicial intimation, may be executed in Scotland by an officer of the court from which such summons, warrant, or judicial intimation was issued, or any officer who according to the present law and practice might lawfully execute the same, or by an enrolled law agent, by sending to the known residence or place of business of the person upon whom such summons, warrant, or judicial intimation is to be served, or to his last known address, if it continues to be his legal domicile or proper place of citation, or to the office of the keeper of edictal citations, where the summons, warrant, or judicial intimation is required to be sent to that office, a registered letter by post containing the copy of the summons or petition or other document required by law in the particular case to be served, with the proper citation or notice subjoined thereto, or containing such other citation or notice as may be required in the circumstances, and such posting shall constitute a legal and valid citation, unless the person cited shall prove that such letter was not left or tendered at his known residence or place of business, or at his last known address if it continues to be his legal domicile or proper place of citation."

The Act of Sederunt 14th December 1805 (passed in relation to the Bankruptcy Act 1793 (33 Geo. III, cap. 74), which was repealed in 1814) provides—"(1) That where any person against whom legal diligence is meant to be executed, or who is to be cited as a party in any judicial proceeding, has left the ordinary place of his residence, which may render it doubtful whether he is within the kingdom of Scotland or not, and consequently whether the charge or citation against him ought to be executed at his dwelling-house or at the Market Cross of Edinburgh and Pier and Shore of Leith, when he is not personally found, it shall in time coming be held and presumed that the said person after forty days' absence from his usual place of residence, but not sooner, is furth of the kingdom of Scotland; and therefore, that within the said forty days the citation or charge may be at his late dwelling-house, but after that period must be at the Market Cross

of Edinburgh and Pier and Shore of Leith, unless he be personally found, or, prior to the execution, shall have taken up some other known and fixed residence within Scotland."

The Judicature Act 1825 (6 Geo. IV, cap. 120), sec. 53, enacts—" . . . That where a person not having a dwelling-place in Scotland occupied by his family or servants shall have left his usual place of residence, and have been therefrom absent during the space of forty days without having left notice where he is to be found in Scotland, he shall be held to be absent from Scotland, and be charged or cited according to the forms herein prescribed accordingly," *i.e.*, by edictal citation.

On March 25th 1893 Mrs Margaret Wylie Vallance or Morrison, 33 Cumberland Street (West), Glasgow, raised an action in the Sheriff Court at Glasgow against John M'Donald Vallance, M.B., her brother, who had resided at 33 Cumberland Street aforesaid, to recover a sum of £472, 5s. 3d., made up of charges for board and lodging while residing there, money advanced for educational expenses and maintenance, and money lent by the pursuer to the defender. She obtained decree in absence on 20th April 1893, and in 1906 on Dr Vallance's death she advanced her claim against his estate. Matthew Harrison, solicitor, West Hartlepool, and others, his trustees, resisted her claim, were sisted as defenders, and reponed against the decree in absence, and, *inter alia*, pleaded—"(3) There having been no valid service of the petition on the original defender, the proceedings are null and void."

The *facts* are given in the following excerpt from the Lord President's opinion:—"The circumstances in this case are peculiar. The pursuer Mrs Vallance or Morrison on 20th April 1893 got decree in absence against her brother Dr Vallance for certain sums alleged to be due her for board and lodging and advances to enable the defender to pursue his studies. After getting that decree the pursuer did nothing till 1906, when the defender died, and she put forward a claim against his executors for the amount found due in the decree in absence. Dr Vallance's executors appeared in the process, and were sisted as defenders, and reponed against the decree in absence.

"The defenders pleaded that the decree in absence against Dr Vallance was bad because of the circumstances of his citation. These circumstances were that prior to 10th March 1893 Dr Vallance lived with his sister, the pursuer, but at that date left to take up a situation as ship's surgeon on board an Allan liner, and never returned to live with his sister. After his departure the pursuer instructed her agents to serve a summons against him, concluding for payment to her of £472, 5s. 3d., made up of payment for board and lodging and for clothes and education during the time the defender resided with her. The pursuer's agents on 31st March 1893 posted the summons in a registered letter addressed to Dr Vallance at the pursuer's house in terms of the Citation Amendment Act. Section 3 of that Act provides that citation by registered letter shall be 'a legal and valid citation, unless the person cited shall prove that such letter was not left or tendered at his known residence or place of business, or at his last known address if it continues to be his legal domicile or proper place of citation.' The registered letter was taken in by the pursuer herself, and though she says that it was forwarded to her brother Dr Vallance, there is no proof that he ever got it."

On 10th July 1906 the Sheriff-Substitute (FYFE), after a proof, the purport of which is given *supra*, dismissed the action.

The pursuer appealed, and argued—(1) The defenders might have suspended or reduced the decree, but since they had chosen to proceed by reponing, and had appeared, it was not in their mouths to plead any irregularity in the service of the petition — Sheriff Courts (Scotland) Act 1876, sec. 12 (2). That enactment was in substantially the same terms as the Court of Session Act 1868 (31 and 32 Vict. c. 100), sec. 21. It therefore covered both the defender himself and his executors, who had been sisted in his place. Having appeared they could not object to the citation—*Corstorphine* v. *Kasten*, December 13, 1898, 1 F. 287, 36 S.L.R. 174. (2) Alternatively the citation was good. In terms of the Citation Amendment (Scotland) Act 1882, sec. 3, the summons in registered letter had been sent to the pursuer's house, which was the defender's legal domicile or proper place of citation. It was his last known address, and that continued to be his legal domicile and proper place of citation for forty days after he had left—A.S., December 14, 1805, sec. 1; *Corstorphine* v. *Kasten*, *ut supra*, Lord Robertson, at p. 293; Mackay's Manual, 197; Dove Wilson's Sheriff Court Practice, 67; Judicature (Scotland) Act 1825 (6 Geo. IV, c. 120), sec. 53. The A.S., no doubt, dealt with service by messenger-at-arms, &c., but it was now competent to cite by registered letter addressed to any place where the defender could formerly have been properly cited—Citation Amendment (Scotland) Act 1882, sec. 3. The fact that the pursuer had herself taken in the registered letter did not prejudice her case; had she not done so, on its return to the Sheriff-Clerk the Sheriff would have ordered service by an officer, who, not finding the defender personally, would have left it, and there could only have done what had been done. The plea should therefore be repelled, and the case should be sent back to the Sheriff for discussion on the merits.

Argued for the defenders (respondents)—The citation was bad, being in no sense the necessary service, but merely service on the pursuer herself, and she was barred by her actings from taking benefit thereby. She had in fact constituted herself an agent for the defender and impetrated a decree by misrepresentation. Further, the pursuer here was in knowledge that the defender had left the country and citation should have been edictal — *Brown* v. *Blaikie*, February 1, 1849, 11 D. 474, Lord Jeffrey at

p. 482; *Cribbes* v. *Ross*, July 15, 1851, 13 D. 1369, Lord Ordinary Rutherfurd at p. 1370. The A. S. of 14th December 1805 was an enabling Act, and provided for cases where there was *bona fide* doubt as to the whereabouts of the person to be cited, but, looking to the pursuer's knowledge, this was an unfair use. The Judicature Act 1825, section 53, prescribed the method in cases where the defender had constructively left Scotland, viz., edictal citation, and that applied here where there was actual knowledge. The Sheriff-Substitute was right, and the action should be dismissed. [Counsel for the defenders were not called upon to reply to the first branch of the argument for the pursuer.]

LORD PRESIDENT—[*After narrating the facts, quoted supra*]—The question raised is a double one—(1) Whether the citation is good under the circumstances apart from the specialties arising out of the position of the pursuer. The answer to that question depends on section 3 of the Citation Amendment Act, which provides for citation by registered letter on the person to be cited at "his last known address if it continues to be his legal domicile or proper place of citation."

There is no question that the pursuer's house was Dr Vallance's "last known address;" the question is whether it continued to be "his legal domicile or proper place of citation." That depends on section 1 of the Act of Sederunt of 14th December 1805, which provides . . . (*quotes supra*) . . .

It was argued for the pursuer that the effect of that section is that after a person goes from his last known place of residence in Scotland, his domicile of citation remains for forty days at that residence. On the other hand, it is argued for the defenders that this is so only if there is a doubt in the mind of the pursuer whether the person to be cited has gone from Scotland or not, but that if the pursuer knows for a fact that he has gone from Scotland then the citation must be edictal even within the forty days.

The point does not seem ever to have been decided, and there are conflicting dicta. On the one side there is the dictum of Lord Jeffrey in *Brown* v. *Blaikie*, 11 D. at p. 482; on the other, that of Lord President Robertson in *Corstorphine* v. *Kasten*, 1 F. at p. 293. I do not think it is necessary to decide this point, though, as far as my own view is concerned it coincides with the dictum of Lord President Robertson and not with that of Lord Jeffrey.

(2) Assuming the citation is good apart from the specialties of this case, the question arises whether it is good in view of those specialties. I am of opinion that it is not, and that the pursuer is barred by her own acts from pleading that the citation is good under the Citation Amendment Act. If she had refused to take in the registered letter it would in terms of the Act have been returned to the Sheriff-Clerk, and decree in absence could not have been got without certain further procedure. The pursuer by taking in the letter constituted herself an agent for the defender without any right to do so. She had no right to take in the summons, but having done so was bound to see that the defender got it. She cannot be heard to say that the defender did get it, so on the specialties of the case I am of opinion that the citation was invalid.

The argument of the pursuer based on section 12 (2) of the Sheriff Courts Act 1876 is obviously unsound, because the party here appearing, *i.e.*, the executors, are not stating an objection to the regularity of the service as against themselves, but as against another person, *i.e.*, the deceased; and in this sense an executor is not *eadem persona cum defuncto*.

LORD M'LAREN—I agree with your Lordship's opinion as to the validity of the service and as to the conduct of the pursuer.

LORD KINNEAR—I agree on the special ground on which your Lordship proposes to decide this case.

On the question as to which of the conflicting dicta, by Lord Jeffrey and Lord President Robertson, is sound, I reserve my opinion until the question is raised in a case in which it is necessary to decide it.

LORD PEARSON—I concur with what your Lordship has said.

The Court affirmed the judgment of the Sheriff-Substitute and dismissed the action.

Counsel for the Pursuer (Appellant)—Orr, K.C.—D. P. Fleming. Agents—Clark & Macdonald, S.S.C.

Counsel for the Defenders (Respondents)—The Dean of Faculty (Campbell, K.C.)—Grainger Stewart. Agents—W. & J. L. Officer, W.S.

Tuesday, June 4.

FIRST DIVISION.

(EXCHEQUER CAUSE.)

GENERAL ACCIDENT ASSURANCE CORPORATION, LIMITED *v.* INLAND REVENUE.

Revenue—Income Tax—Insurance Company—Insurance other than Life—Profits—Deductions—"Unexpired Risks"—Property and Income Tax Act 1842 (5 *and* 6 *Vict. c.* 35), *Sched. D, First Case, Rule* 1.

A company carrying on the business of accident, fire, &c., insurance (as distinguished from life insurance), is not entitled, in arriving at the yearly amount of its assessable profits, to deduct or make any allowance for unexpired risks. *Scottish Union and National Insurance Company* v. *Inland Revenue*, February 8, 1889, 16 R. 461, 26 S.L.R. 330, *followed*.

The Property and Income Tax Act 1842, Schedule D, First Case, Rule 1, enacts—"The duty to be charged in respect thereof" (*i.e.*, in respect of any trade, &c., not contained in any other schedule of the Act) "shall be computed on a sum not less than