money—for example, he might have charged the estate with provisions to his wife and children, or might have disentailed it with the requisite consents, as he might have disentailed trust money; but he was not entitled to the powers of an heir in possession of specific estate (such as charging the estate with the cost of improvements), because it was not intended by the truster that Maryculter should ever be enjoyed *in forma specifica* as an entailed estate.

"I am therefore of opinion that the petitioner is not entitled under the powers of the statute to charge the estate with the cost of improvements executed by her husband. Under a different form of action she may, as her husband's assignee, possibly recover from the estate the value of meliorations made by him in *bona fide* on a title of possession. As to that question I give no opinion. In the view I take of the present application I must refuse the prayer of the petition."

Counsel for Petitioner—Ferguson. Agents—Auld & Macdonald, W.S.

Friday, December 2.

SECOND DIVISION.

COMBER *v.* MACLEAN.

Personal Bar—Abandonment of Part of Conclusions—Foreign Decree.

An Englishman sued a Scottish stockbroker for a certain sum due on the balance of accounts between them, and for damages for breach of contract, and obtained from the English Court, upon an *ex parte* affidavit, an order for leave to issue the writ for service in Scotland. The case having come on for hearing before the English Court, the Judge there, being of opinion that the case would be more conveniently tried in Scotland, pronounced an order to the effect that all proceedings should be set aside unless the plaintiff confined his claim to the sum admitted to be due on the balance of accounts. The defender paid that sum, and the pursuer accepted the payment. *Held* that he was not thereby barred from raising an action in the Courts of Scotland for damages in respect of the alleged breach of contract.

Foreign Jurisdiction—Process—Judicature Acts 1873, 1875, 1877 (36 *and* 37 *Vict. c.* 16, 38 *and* 39 *Vict. c.* 77, 40 *Vict. c.* 9)—*Service out of Jurisdiction.*

Observations (*per* Lord Justice-Clerk and Lord Young) as to the mode in which the extended jurisdiction conferred by these statutes, and by the relative rules of Court in England is exercised.

In the course of the period between April 1880 and the end of September 1880, William Francis Comber, residing in Huddersfield, had certain transactions in railway and mining shares with James Grant Maclean, stock and share broker in Stirling. These transactions were partly on his own account, and partly on joint-account with a Mr Gledhill, of Huddersfield. The contract-notes were headed "Stirling," and the transactions were declared to be "subject to the rules of the Stock Exchange." On the 2d October 1880, Maclean, who had previously intimated to Comber that he would require a certain deposit as "cover" on the transactions (which had previously been carried over from settling-day to settling-day), realised without orders, in consequence of the "cover" demanded not being provided, a number of stocks belonging to Comber, although that date was between settling-days. Comber thereupon, on the allegation that had Maclean closed the transactions according to his instructions on 12th October 1880, the making-up day for the next settlement, there would have been a balance due to him of £119, 17s., raised an action for that sum in the High Court of Justice (Queen's Bench Division) under the provision of order 11, rule 1 A, framed by the Judges of the High Court of Justice in pursuance of the Judicature Acts 1873, 1875, and 1877. That rule is in the following terms:—"Whenever any action is brought in respect of any contract which is sought to be enforced or rescinded, dissolved, annulled, or otherwise affected in any such action, or for the breach whereof damages or other relief are or is demanded in such action, when such contract is made or entered into within the jurisdiction, or whenever there has been a breach within the jurisdiction of any contract wherever made, the Judge, in exercising his discretion as to granting leave to serve such writ or notice on a defendant out of the jurisdiction, shall have regard to the amount or value of the property in dispute, or sought to be recovered, and to the existence in the place of residence of the defendant, if resident in Scotland or Ireland, of a local Court of limited jurisdiction in the matter in question, and to the comparative cost and convenience of proceeding in England or in the place of such defendant's residence; and in all the above-mentioned cases no such leave is to be granted without an affidavit stating the particulars necessary for enabling the Judge to exercise his discretion in manner aforesaid, and all such other particulars (if any) as he may require to be shown."

Maclean admitted that he was indebted to Comber to the amount of £67, 9s. 8d.

The defendant Maclean being resident in Scotland, out of the jurisdiction of the High Court of Justice, it was necessary for the plaintiff to make affidavit that the case was one falling under the provisions of this rule. Comber, therefore, on 20th October 1881, swore an affidavit, of which the following are the material portions:—"I, William Francis Comber, of Huddersfield, in the county of York, manufacturer, make oath and say as follows—1. That the above-named defendant, J Grant Maclean, is a stockbroker, and resides at Stirling, in Scotland, the same being a place out of the jurisdiction of this Honourable Court. 2. That the said J Grant Maclean is a British subject. 3. That I am advised and believe that I have a good cause of action against the said J Grant Maclean, arising within the jurisdiction, for money admitted by the said J Grant Maclean to be due on accounts stated between us, and no payment of which has been made or tendered to me, and also for breaches of certain contracts made between us for the delivery to me of stocks and shares dealt in on the London Stock Exchange, under

the circumstances hereinafter stated. . . . 9. That there is no local Court of limited jurisdiction at Stirling having jurisdiction in the matter in question. 10. That the said contracts being made subject to the rules of the Stock Exchange, I am advised and believe that it will be necessary for me to call as witnesses on my behalf, at the trial of such action, stockbrokers and members of the London Stock Exchange familiar with such rules. The whole question to be tried in such action is, Whether the said J Grant Maclean was bound to deliver the said stocks and shares according to the said contracts, and what damages I have sustained by the non-delivery thereof? 11. That it would be inconvenient that this dispute should be tried in Scotland, and the expenses of such a trial, if the necessary witnesses were conveyed from London to Scotland, would be excessive. 12. That the amount which I intend to claim in this action is upwards of £100." . . .

Following on this affidavit, which came before Mr Justice Stephen as an *ex parte* application, there was at once issued a writ of summons calling on the defendant to enter appearance to defend the action within twelve days. The Judge also issued an order allowing this writ to be served on Maclean at Stirling. Maclean thereupon took out a writ of summons to set aside this writ, "on the ground that the alleged contract between the plaintiff and proposed defendant was not made or entered into within the jurisdiction, or wherever made, that there has been no breach of the alleged contract within the said jurisdiction; and also on the ground that there is a local Court of limited jurisdiction in Scotland where the proposed defendant resides, in which this action might with greater convenience and less cost be proceeded with." On the day following the taking out of this summons by the defendant's solicitors, the defendant swore an affidavit, the material part of which is as follows:—"10. Referring to the tenth paragraph of the affidavit of the said William Francis Comber sworn and filed in this matter, I say that I am not a member of the London or any other Stock Exchange out of Stirling, and that none of the said contracts were made subject to the rules of the London Stock Exchange, as therein stated. Farther, I am advised and believe that the evidence of stockbrokers and members of the London Stock Exchange, as in the said paragraph suggested, would be altogether unnecessary and irrelevant in the question at issue, or as raised upon the affidavit of the said William Francis Comber. Moreover, I am informed and believe that the rules of the London and the leading Stock Exchanges are substantially, if not altogether, the same, so that if it became necessary to have the evidence of brokers and members of a Stock Exchange, as stated in the said affidavit, there are plenty of such brokers in Edinburgh and Glasgow, both about 30 miles distant from Stirling, who could give evidence upon the trial of such question in Scotland. 11. Save as stated above, and what is shown by the transactions hereinbefore referred to, there was no engagement, agreement, or other relationship between me and the said William Francis Comber. Whatever under that engagement is in any respect due by me to the said William Francis Comber, I submit is so due by me at Stirling aforesaid, and if there has been any breach—which I deny—of any agreement or engagement between us, I am advised that such breach has not occurred within the jurisdiction of this Honourable Court. 12. Referring to the ninth paragraph of the said affidavit, I say that there is a local or County Court held at Stirling aforesaid, which has jurisdiction to entertain the matters in question between me and the said William Francis Comber, such Court having unlimited jurisdiction in regard to amount for which actions may be brought, and also in questions affecting real estate to the extent of £1000 in value; and I further say that very great inconvenience and expense would be caused to me by leaving my business in Stirling, and attending in London, along with my books and clerks, if the said proposed action were to be permitted to proceed in this Honourable Court."

With respect to this affidavit the plaintiff lodged an additional affidavit, of which the material portions were:—"12. With respect to the tenth paragraph of the said affidavit, I say that the question to be tried in this action is, Whether the defendant, having bought on my account stocks on the 28th September for the 14th October account, was justified in selling the same and closing the account on the 2d October without any orders from me to that effect? The question is entirely one of the construction of written documents, and of the rules and practice of the Stock Exchange. 13. With respect to the eleventh paragraph of the said affidavit, I say that the defendant is liable to pay to me the balance of the account due to me by the defendant in Huddersfield, and I was and am under no legal obligation to go to Stirling to obtain money which the defendant admittedly owes to me. I submit that part of the subject-matter of this action is money due and payable to me within the jurisdiction. 14. With regard to the twelfth paragraph of the said affidavit, I say that there is no local or County Court held at Stirling of limited jurisdiction competent to try the matters in dispute in this action, and as the matters in dispute are matters of law rather than matters of fact, and as the documents of contract which I sue are in my possession, there will be no necessity for the defendant to bring any books or papers, or any clerks, to London to the trial of this action."

These writs and opposing affidavits came before Mr Justice Hawkins at Chambers on 23d November 1880, when that Judge pronounced an order that the writ dated the 27th day of October 1880 (the writ of summons), and the order giving the plaintiff leave to issue the writ for service out of the jurisdiction, and all other proceedings herein, be set aside unless the plaintiff confines his claim to the amount stated, for £67, 9s. 8d. admitted by the defendant to be due.

The plaintiff appealed against this order to the Divisional Court of Appeal. That Court—Grove & Bowen, J.J.—dismissed the appeal with costs. The opinion of the Court was delivered by Mr Justice Grove, and is recited in the opinion of the Lord Justice-Clerk.

The sum of £67, 9s. 8d., less the defendant's taxed costs in the appeal, was then paid to the plaintiff, who in accepting that sum reserved right (which defendant disputed) to bring the present action in Scotland for the balance of the £119, 17s. originally claimed. The present

action was then brought in the Court of Session by Comber for £52, 7s. 4d., the balance of that amount, being the damages alleged by the pursuer to have been suffered by him through the defender's breach of contract.

The defender, besides disputing the validity of the claim on the writs, pleaded—"4. The pursuer having been allowed to obtain decree in the said English action, on condition of his abandonment of the balance of his claim, and having received payment of the sum contained in the decree, is not now entitled to sue for the said balance, and the present action is therefore barred."

The Lord Ordinary, after a proof, found on the writs that the defender had been in breach of contract in selling as he did on the 2d October, "and would have been liable to the pursuer for the difference between the sale prices of the making-up prices of 12th October had the pursuer not been barred from insisting on this claim." *His Lordship then narrated, as findings in fact, the proceedings in the English Courts above detailed, and found in law* "that the said proceedings in the English Courts are a bar to the pursuer's insisting against the defender for the same claim of damages which he abandoned by confining his claims under said action to the amount of the account stated." He therefore assoilzied the defender with expenses.

His Lordship in giving judgment pronounced this opinion—[*After narrating the grounds for holding that the defender had been in breach of contract*]—"If the case, therefore, had to be decided upon the facts as above stated, the claim for the pursuer for damages must have been sustained. But he has cut away the ground from beneath his feet by his own action. He instituted a suit in England in the High Court of Justice, in which he made the same claim for damages that he makes in this action, along with a claim for the balance in the defender's hands admitted by the latter. In order to obtain service on the defender out of England, the pursuer required to make affidavit so as to show to the English Court that it had the right to send its writs into Scotland, and to exercise jurisdiction in the matter; and for this purpose the pursuer made this amazing statement upon oath twice over—'That there is no local Court of limited jurisdiction at Stirling having jurisdiction in the matter in question;' that is to say, that there is no Court at Stirling which could entertain an action against a stockbroker resident in Stirling for breach of contract. In the second affidavit the matter is put more broadly, thus:—'I say that there is no local or County Court held at Stirling of limited jurisdiction competent to try the matter in dispute in this action.' Whether this deposition was believed by Mr Justice Hawkins does not appear, but the repetition of it in two affidavits seems to indicate that it was necessary to establish this matter before the learned Judge of the Queen's Bench Division sustained his jurisdiction. The Lord Ordinary is not called upon to determine whether the English Court had jurisdiction in the case. He assumes that it had jurisdiction, and he is certainly entitled to assume that as against the pursuer, who applied to the English Court. On that assumption the case stands thus—The pursuer was found entitled to a sum of £67 odds if he abandoned the remainder of his claim, viz., the claim for damages now insisted on in the present action. The English Court had as much right to determine the claim for damages as to order payment of the £67 upon the accounts stated; and the case therefore is now in the same position as if the pursuer in order to obtain decree for the £67 had put in a minute of abandonment of the rest of his claim. Whether that abandonment was made in England or in Scotland is of no moment. The abandonment was made, and it is binding on the pursuer."

The pursuer reclaimed, and argued—The Lord Ordinary's interlocutor proceeded on the view that the pursuer was personally barred by having taken an English decree on a matter on which the English Courts must be held to have had jurisdiction. Now, there was no decree for a sum, but merely an order that the writ of summons should be set aside unless the pursuer confined his "claim" (a technical term of English pleading) to the admitted debt. The action was only a "proposed" action, and there had been no abandonment of any part of the sum demanded; on the contrary, the claim for it had been distinctly reserved at the time when the sum admitted to be due was paid. The whole case had been treated by the English Judges as a matter for the exercise of a discretion whether the case would be best tried there or no. What the pursuer did was only to yield to the view of the Court that the question of damages for breach of contract could best be tried in Scotland. He referred to 15 and 16 Vict. c. 76, sec. 18 (Common Law Procedure Act 1852), on restriction of conclusions of action—*Stewart* v. *Greenock Harbour Trust*, June 26, 1868, 6 Macph. 954.

Argued for defender—The pursuer had by the restriction of his claim barred himself by a judicial contract from demanding the sum now sued for. In order to save his whole case from being thrown out with costs, he had been content to take the sum admitted to be due. He was not entitled in these circumstances to separate the two claims. The English Court had, indeed, as much jurisdiction to deal with the one as with the other. The pursuer could not be heard to say that the case which according to his own affidavit could be best tried as a whole in England, should now be set up into two cases, one in the Supreme Court of each country.

At advising—

Lord Justice-Clerk—This case stands in a peculiar position. It seems that Maclean is a stockbroker in Stirling, and that Comber is an Englishman, residing in Huddersfield, who has had certain transactions with him. On these a balance had arisen of £67, and there were also proceedings, consisting, as the pursuer maintains, of breach of contract, out of which arose a claim of damage to him. His ordinary course was to have raised an action in the domicile of the debtor, *i.e.*, in this country, but it appears that there exists in England, under the Judges' orders, a power in the Common Law Courts of "substituting service," as it is called, beyond the territory. That matter has been the subject of more than one attempt at legislation in my recollection, and the result of one attempt was the Act of 1852, in which there was the express provision that there should not be such service in Scotland or Ireland. That Act was passed after full Par-

liamentary discussion. I am not at present in possession of details as to later attempts at legislation on the matter, but such, I believe, there were, and now it appears that without Parliamentary discussion it has become part of the common law that the English Courts have such power under the orders of the Judges, of which I wish to say nothing disrespectful. On that subject I shall say no more than this, that the present case seems to me to be a good illustration of some of the consequences of going counter to the maxim *actor sequitur forum rei.* In the present case the first step was to obtain an order for service on a writ of summons stating the grounds of action. That order followed as matter of course, but it remained with the Court to say whether the writ of summons on which the jurisdiction proceeds should or should not stand, and the Court had the power of recalling that or correcting it if necessary. The claim was brought before Mr Justice Hawkins, and we have a print before us of the original affidavit, in which the plaintiff states as follows—[*His Lordship here read the affidavit first above quoted*]. I have read this affidavit with considerable surprise, because so far as the statements made in it are allegations of fact, and not of belief, there is scarcely one true thing in it. It is not the case that the bargains were made according to the rules of the London Stock Exchange. The statement that there is no Court of limited jurisdiction at Stirling before which the case might be tried must have been deliberately made to deceive the Court as to what Courts in Scotland were competent to try the case. I must fairly own—while I say nothing disrespectful of the English Courts—that if these powers are to be exercised, these Courts ought to be made sure that the statements made in such affidavits are true. Mr Justice Hawkins not unnaturally was of opinion that this was not a kind of case to be litigated in the English Courts. He found that there was an admitted balance of about £67, and also an illiquid claim of damages. The transactions did not appear to have been conducted according to the rules of the London Stock Exchange, and he pronounced judgment that while decree might be given for the undisputed balance of £67, he was not prepared to allow the whole claim, and that if the plaintiff chose to limit his claim to the £67, he would give him that remedy, but if not—if the whole case were to be taken together—he would find that the matter had occurred outside his jurisdiction, and that it was not convenient that it should be tried before him. That judgment was appealed to the Divisional Court, and we have before us notes of the judgment of Mr Justice Grove. I do not need to do more than read them. They form a conclusive answer to the respondent here. Mr Justice Grove said—"I think it is really a matter of discretion. It is not contended by Mr Vaughan Williams that a Judge is bound to let a writ issue, or that a Judge may not set it aside. Here the Judge who first heard it (Mr Justice Stephen) had only an *ex parte* affidavit before him. Mr Justice Hawkins had the whole matter before him; he had an affidavit by the defendant and an affidavit by the plaintiff in reply. So far from saying he is wrong, the balance of my opinion is a little—I do not say very strongly—that he was right, but it is difficult to say whether a Judge who heard the whole case argued at one time would have exactly the same view of the case as a Judge who hears it afterwards; but I conceive Mr Justice Hawkins must have arrived at his decision upon the ground of the balance of convenience being decidedly the other way, and I see very good grounds for coming to such a decision. The dealings out of which this action arose occurred in Scotland. The matter is subject, I think, to the rules of the Scotch Stock Exchange. The document is headed 'Stirling,' and it is said subject to the rules of the Stock Exchange. It does not say 'the London Stock Exchange.' I should say that is the Stock Exchange of Stirling, though these do not differ from the rules of the London Stock Exchange. The question therefore resolves itself into which is the more convenient—Is the defendant to be brought to London, or is the plaintiff to go to Scotland? I should think the defendant would be likely to have more witnesses than the plaintiff; but that is a matter wholly for the discretion of the Judge. The books would be in Scotland, and there is a Court in Scotland, not such a Court as is alluded to in Rule A, of limited jurisdiction, but a Court competent to try it" [I do not know if this was explained to Mr Justice Grove, but I should think the Sheriff Court at Stirling was perfectly competent to try the case], "and I think it would be an unusual interference with the discretion of a Judge in a matter which appears to me to be wholly a matter of discretion. It is like a motion for changing the *venue*, which is entirely a matter of discretion." That judgment never could have been delivered in a case which had come to this result, that one claim had been abandoned and discharged, and the remaining claim entertained. The ground of judgment was that the Scotch Courts were the proper tribunals for the case. It seems to me that the Lord Ordinary has, very naturally in such a case, fallen into the error of thinking that the pursuer by his own conduct in making affidavit that the case could only be tried in London was cut out of this remedy. But I see no element of discharge of this claim, and in consequence I think that this interlocutor must be recalled.

Lord Young—I am of the same opinion. On this question of bar I concur in thinking there is no bar at all. The pursuer has *prima facie*—for he holds the judgment of the Lord Ordinary on this point—a good claim of damages for breach of contract. He had also a claim for £67 on an account for prices of stocks sold by the defender on his account. Thinking that his case would be better tried in England, he resorted thither, saying in an affidavit that the sum of £67 was admittedly due to him. That is one of the few true things in his affidavit. He says also that he had not taken payment of that sum, because it was only tendered on condition of his giving a discharge in full, and he states in his claim a claim of damages for breach of contract. He obtained an order for service of his claim on most untrue statements, which I cannot readily excuse, because no one is entitled to make such statements on oath without inquiry, and no one who really made inquiry would be told that such statements were true. Such statements make me inclined to be prejudiced against the pursuer, but I cannot proceed judicially on prejudices, and the question being whether he waived his

claim for damages as a condition of getting an order on the defender to pay what the defender admitted to be due, I think there is no ground for holding that he did. The case having been brought before him, Mr Justice Hawkins, thinking it would be ridiculous to send the case to the Scotch Courts about what was admitted, said to the pursuer—"If you will confine your claim to that, you shall have decree for it. With respect to what is not admitted, it will be more convenient to have the case tried elsewhere." With both affidavits before him he was satisfied that the case, so far as disputed, ought to be tried in Scotland. The claim accordingly was confined to the admitted sum, but with no more effect than if it had been so limited at the beginning. I think there is no ground for holding that the claim which the Lord Ordinary thinks is well founded on its merits was waived and abandoned, or that the pursuer is barred. I should gladly have come to a different result, for I do not like this kind of action—an action by a mere gambler for differences against his broker—and as little do I like the statements in his affidavit, which I consider to be deliberate and wilful falsehoods.

Lord Craighill concurred.

The Court recalled the interlocutor of the Lord Ordinary, and gave decree in terms of the conclusions of the summons.

Counsel for Pursuer—D.-F. Kinnear, Q.C.—H. Johnston. Agents—Mackenzie & Kermack, W.S.

Counsel for Defender—Lord Advocate (Balfour, Q.C.)—Lang. Agents—Paterson, Cameron, & Co., S.S.C.

Friday, December 2.

FIRST DIVISION.

PETITION—RAINHAM AND ANOTHER.

Jurisdiction — Presumption of Life Limitation (Scotland) Act 1881 (44 *and* 45 *Vict. cap.* 47).

The Presumption of Life Limitation (Scotland) Act 1881 makes provision regarding the sucession to the heritable or moveable estate of "any person who has been absent from Scotland, or who has disappeared for" various periods of years therein specified. *Held* that the statute did not apply in the case of the disappearance of a person who had never been in Scotland, and whose only connection with that country was through an aunt who had married a Scotchman, and to whose heritable estate in Scotland it was averred that the absentee had succeeded.

By mutual disposition and settlement, dated 11th September 1847, executed by David Edmiston, gamekeeper, Newburgh, Fifeshire, and Mrs Frances Rainham or Edmiston, his wife, David Edmiston, *inter alia*, conveyed to his wife, in case she should survive him, and to her heirs, executors, and assignees whomsoever, all and sundry his heritable and moveable estate, of whatever nature or denomination the same might be, which should belong or be addebted to him at the time of his decease. By codicil to this mutual disposition and settlement, dated 27th May 1865, the spouses, still further to regulate the succession to their respective means and estate in the event of the survivor of them failing to execute any other conveyance thereof, left and bequeathed their means and estate, so far as the same might be extant and belonging to the survivor of them at the time of his or her death, but only in that event, to William Rainham, engineer in Glasgow, brother of Mrs Edmiston.

David Edmiston died without issue on the 19th December 1872, survived by his wife, who under the above mutual settlement succeeded to her husband's whole means and estate, and, *inter alia*, to certain heritable subjects in Newburgh. She did not again marry, and died without issue on 13th June 1873; she did not make up any title to the heritable property left by her husband, or leave any settlement or *mortis causa* writing other than the mutual disposition and settlement and codicil above mentioned. William Rainham, to whom this property was destined by the codicil, predeceased both the spouses, leaving two children, Rose Ann Rainham and William J. Rainham, presently in India; but there being no destination to heirs, and the trusters not being *in loco parentis* to William Rainham, the property fell to the heir-at-law of Mrs Edmiston. William Rainham was her elder brother. She had likewise two sisters who survived her, viz., Mrs Grace Rainham or Sparks, wife of Edmund Sparks, of Longton, Staffordshire Potteries, and Anne Maria Rainham; and she had also an immediate younger brother, Timothy Rainham, who (as the present petition averred) "has disappeared for a period of eighteen years, and has not been heard of from that time. The last time he was heard of was in the month of April 1863, when he wrote a letter to his sister, the said Mrs Grace Rainham or Sparks. At that time he was following the occupation of a house-painter under an assumed name in London, but it was stated by him in the said letter that he would not be there long, and it is supposed that he went abroad."

By section 1 of the Presumption of Life Limitation (Scotland) Act 1881 it is enacted that "In the case of any person who has been absent from Scotland, or who has disappeared for a period of seven years or upwards, and who has not been heard of for seven years, and who at the time of his leaving or disappearance was possessed of or entitled to heritable or moveable estate in Scotland, or who has become entitled to such estate in Scotland, it shall be competent to any person entitled to succeed to an absent person in such estate to present a petition to the Court setting forth the said facts; and after proof of the said facts, and of the petitioner's being entitled as aforesaid, after such procedure and inquiry by advertisement or otherwise as the Court may direct, the Court may grant authority to the petitioner to uplift and enjoy the yearly income of the heritable or moveable estate of such absent person, as the case may be, and to grant all requisite discharges for the same, as if the said absent person were dead; or the Court may sequestrate the estate, and appoint a judicial factor thereon, with the usual powers, and with authority to pay over the free yearly income of the estate to the petitioner, whose discharge shall be as valid and effectual as if granted by the absent person."