

tor so far as the fee goes, but only in the case of there having been an arrangement between him and the surveyor that he should do so. In the present case Mr Macgregor, for reasons which have not been explained, but which are not necessary for the disposal of the case, chose to object to the charge of £74, and I am clearly of opinion that the contractor could not have brought an action against him for the amount. In taking payment of his account he deducted the £74, and took payment of the balance, which was all he had a title to demand. It has been said that Gilroy was betraying the pursuer's interests in taking payment of his account behind the pursuer's back, but I do not think that there is any ground for saying that. Mr Gilroy had been lying out of his money for a considerable time, and that was due to the delay of the pursuer—he was the cause of it. It might be represented that Gilroy should have consulted Beattie when Macgregor refused to pay the fee charged by him as measurer, and that he did not; but that is mere observation, and there is nothing to create legal liability. I have no hesitation in saying that the interlocutor of the Lord Ordinary is right, and that there was no employment of the pursuer by the defender.

LORDS MURE and SHAND concurred.

LORD DEAS was absent.

The Court adhered.

Counsel for Pursuer (Reclaimer)—Pearson—Macfarlane. Agents—Millar, Robson, & Innes, S.S.C.

Counsel for Defender (Respondent)—Trayner—Keir. Agents—Romanes & Simson, W.S.

Saturday, November 25.

SECOND DIVISION.

DOUGALLS, PETITIONERS.

Succession—Presumption of Life Limitation (Scotland) Act 1881 (44 and 45 Vict. c. 47), sec. 1—Competency—Application for Expenses of Petition out of the Estate of Absentee.

In a petition, under section 1 of the Presumption of Life Limitation (Scotland) Act 1881, for sequestration of the estate of an absentee, and appointment of a judicial factor thereon, the expenses of the application cannot competently be allowed out of the capital of the estate.

This was a petition by the wife and child of a person said to have been absent from Scotland for upwards of seven years, and not to have been heard of, to have estate to which he had succeeded during his absence sequestrated and a judicial factor appointed thereon.

The Presumption of Life Limitation (Scotland) Act 1881 provides by section 1—"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, and 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."

The petitioners stated that A. K. Dougall, the absentee, left Scotland in 1870, and that a number of letters were received from him between that year and the year 1874, when a letter was received from him which formed the last tidings of him which they had received. The petitioners stated that since that time several letters had been written to him without any answer being received, and that inquiries had been made as to his whereabouts from former employers and others without any tidings being obtained.

The petitioners further stated that the absentee's father having died in 1879 the absentee became entitled to a sum of about £700 as legitim from his estate. They craved the Court, under the second branch of section 1 of the Act, "to sequestrate the said estate of the said Alexander Kinmonth Dougall, and appoint such person as to your Lordships shall seem proper to be judicial factor thereon, with the usual powers, and with authority to pay over the free yearly income of the said estate to the petitioners, including the interest accrued on the said estate from the said 5th day of March 1882, and also to pay the expenses of this application and procedure to follow hereon out of the said estate, he finding caution before extract."

Argued for them—The expenses of the application ought to be paid out of the capital of the estate, because it would require the yearly income for two or perhaps three years to cover the expenses of the application; during that period the petitioners, who had no means of their own, who were dependent for support on the wife's relations, and who were legally entitled to aliment from the absentee or his estate, would derive no benefit and receive no support therefrom. The procedure was really an equivalent for an action of aliment, in which the petitioners would have received expenses besides an award of aliment.

The Court, after hearing counsel, held that there was no power under the Act founded on to grant the prayer of the petition as regarded the taking of the expenses of the application out of the capital of the estate, the section applicable to the circumstances merely giving power to deal with the income of the estate.

Counsel for Petitioners—MacWatt. Agent—W. Steele, S.S.C.