Tuesday, December 8.

SECOND DIVISION.

[Lord Stormonth Darling, Ordinary.

BORTHWICK *v.* BORTHWICK.

Title to Sue—Executor—Reparation—Declarator of Marriage—Breach of Promise and Seduction—Alternative Conclusion.

The conclusions of a summons were (1) for declarator of marriage, (2) "but if it shall be found that the pursuer is not married to the defender, then and in that case" for £3000 damages for breach of promise and seduction. The pursuer pleaded (1) that declarator of marriage ought to be pronounced; (2) "or alternatively," that decree ought to be pronounced "in terms of the alternative conclusions of the summons."

After raising the action the pursuer died, and her executor craved to be sisted as pursuer in her place in order that he might insist in the conclusion of the action for damages.

Held (*aff.* Lord Stormonth Darling, Ordinary) that the conclusions of the action were substantially alternative, and that the executor was entitled to be sisted as craved.

Opinion (by Lord Young) that the executor of a pursuer who had died after raising an action of declarator of marriage was entitled to be sisted as pursuer and proceed with the action.

On 15th November 1895 Mrs Minnie Green or Borthwick raised an action against Robert Forrester Borthwick. The conclusions of the summons were as follows:—"Therefore the Lords of our Council and Session ought and should find facts, circumstances, and qualifications proven relevant to infer marriage between the pursuer and the defender, and find them married persons accordingly; and therefore decern and ordain the defender, the said Robert Forrester Borthwick, to adhere to and cohabit with the pursuer, and treat and entertain her in all respects as his lawful wife: But if it shall be found that the pursuer is not married to the defender, then and in that case the defender ought and should be decerned and ordained, by decree foresaid, to make payment to the pursuer of the sum of £3000 sterling on account of the defender having refused to implement and fulfil a promise of marriage made by defender to the said pursuer, and on account of the defender having seduced the pursuer."

The pursuer pleaded in her first two pleas-in-law that marriage having been duly constituted between the pursuer and defender, declarator ought to be pronounced to that effect; and 3. "Or alternatively, the defender having promised to marry the pursuer, and having failed to carry out his promise to her, and having seduced her, decree ought to be pronounced against him in terms of the alternative conclusions of the summons."

The defender lodged defences, in which he denied both marriage with the pursuer and breach of promise and seduction.

On 21st December 1895 the Lord Ordinary (STORMONTH DARLING) closed the record and allowed a proof.

On 31st December the pursuer died intestate, and on 30th March 1896 her brother George Green was appointed her executor-dative.

Thereafter the executor-dative lodged a minute craving the Lord Ordinary "to sist him as pursuer in room and place of the said Minnie Green or Borthwick."

On 31st October 1896 the Lord Ordinary pronounced the following interlocutor:—"Sists George Green, executor-dative to the deceased pursuer Minnie Green or Borthwick, as pursuer in room and place of the said deceased Minnie Green or Borthwick, conform to minute of sist . . . and allows the parties a proof of the averments on record relative to the conclusion of the summons for damages for breach of promise and seduction, to proceed on a day to be afterwards fixed.

Note.—"The defender's counsel admits that an executor has a good title to insist in an action of damages for injury to person or character, provided it has been raised by the deceased person before his death. This rule is well settled, and is not affected by the fact that under the judgment in *Bern's Executor* v. *Montrose Asylum*, 20 R. 859, a different rule holds where the deceased person has died without raising the action. Accordingly, if the present action had been one simply of damages for breach of promise and seduction, there could have been no doubt of the executor's right to be sisted as a pursuer in room of the defunct. But it is said that the executor has no such right, because the leading conclusion is for declarator of marriage. I assume that this is a conclusion so purely personal to the woman that, especially when founded on promise *subsequente copula*, it could not be insisted in by anyone else. Indeed the executor here avows his intention, if he be sisted, of prosecuting the action only to the effect of recovering damages. I am quite unable to see why the presence of this conclusion in the summons should affect the executor's right to be sisted. Once he is sisted he can elect to proceed only under the conclusion for damages, just as the deceased could have done. There is nothing inconsistent in the two conclusions, because the proof of promise, in order to establish marriage is of a much more stringent kind than the proof of promise to obtain damages for breach, and the deceased herself, while maintaining the promise to the fullest extent, might well have despaired of establishing it by the writ or oath of the defender.

"Accordingly, the executor, in the course which he proposes, need not contradict or abate one word of the averments which the deceased instructed her advisers to make. He might conceivably be met (though I have

no reason to suppose that he will be met) by a proposal on the part of the defender to amend his pleadings to the effect of submitting that there was a marriage, but that is an answer which might equally be made although there was no conclusion for declarator. Whether such an averment would avail the defender after closing the record on the footing that there was no marriage, is a different question, which has nothing whatever to do with the form of the action. On the record as it stands, the parties have joined issue on the question whether the admitted connection was mere concubinage, or a surrender of the woman's person induced by a promise of marriage, and I am of opinion that the executor is entitled to be sisted in order to prove that it was the latter, and thus to recover the pecuniary damages which in that case (failing marriage) would have been due to the deceased."

The defender reclaimed, and argued—It was conclusively settled that an executor is not entitled to institute an action personal to the deceased whom he represents, even where damages are sought, as in an action of damages for seduction or breach of promise—*Bern's Executor* v. *Montrose Asylum*, June 22, 1893, 20 R. 859. If an action of damages for personal injury had been raised during the lifetime of the deceased, her executor was entitled to carry it on after her death. The present was not an action of damages. The leading conclusion of the summons was one for declarator of marriage. That was a conclusion entirely personal to the status of the original raiser of the action, and was barred by her death, and could not be continued by her representative—Bell's Principles, s. 1534; Fraser's Husband and Wife, p. 1145. The representatives of the defender in such an action could be sisted if the defender died after the raising of the action—*Ritchie* v. *Ritchie*, March 11, 1874, 1 R. 826. But the representatives of the pursuer could not be sisted where the pursuer of such an action died during its progress. The conclusion for damages was subsidiary to the conclusion for declarator of marriage, and could not be proceeded with till the first conclusion was disposed of—*Stewart* v. *Menzies*, February 4, 1836, 14 S. 427; *Robertson* v. *Henderson*, November 19, 1833, 12 S. 70. The pursuer having died, it was impossible to dispose of the first conclusion, and the whole action therefore fell.

Argued for the defender—The conclusions of the action were alternative. This was shown by the pleas-in-law for pursuer. The conclusions were separable and destructive of one another. The first conclusion referred to an entirely different matter from that specified in the second, and the one could not be taken along with the other. The executor proposed to drop the declaratory conclusion, and the defender would be relieved of that conclusion. The declaratory conclusion having been dropped, the action would proceed as if it never had been there at all.

At advising—

LORD YOUNG—In 1895 a young woman raised an action against a Mr Borthwick. The first conclusion is for declarator of marriage, the second and only other conclusion (which is necessarily alternative to the first) is for damages for seduction. Shortly after the pursuer raised her action she died, and her executor lodged a minute craving to be sisted as pursuer in her room and place. The Lord Ordinary pronounced an interlocutor sisting the executor as pursuer, and it is against this interlocutor that the defender has reclaimed. The question therefore which we have to decide is whether this judgment of the Lord Ordinary is right, which declares that the executor of a pursuer who has died after raising an action of this kind is entitled to be sisted as pursuer in room and place of the deceased?

On this subject I have already expressed an opinion in the case of *Bern's Executor* v. *Montrose Asylum*, June 22, 1893, 20 R. 873. What I said was this—"I have not overlooked the rule of our law and practice that the raising of an action by the sufferer from the wrong changes the situation altogether." That is dealing with the rule brought before the Court, that a claim for damages for personal wrong of any kind does not transmit either to the executor of the party against whom the wrong is committed, or against the executor of the party committing the wrong. "Action raised changes the situation in many, perhaps most, other cases as well as this, and that for reasons quite apart from the notion of discharge or waiver being thereby excluded. The most obvious of these is perhaps this, that the case is there brought within these well-settled rules, viz., 1st, that when the defender in a pending action dies it may always be transferred against his legal representatives; and 2nd, that when the pursuer of such action dies, not only may his representative be sisted in his room, but if required by the defender must sist himself or allow the defender to have judgment on the footing of his refusal, which will be effectual against the estate of the deceased which he holds or administers. The effect may seem great and striking when the action has been newly brought, but it has been found impossible to distinguish between one stage of an action and another. This rule of our law that action raised changes the situation is in accordance with, but not so far as I know founded on the Roman law on the same subject (Justinian Institutes, lib. 4, tit. 12, sec. 1)—"Pœnales autem actiones quas supra diximus si ab ipsis principalibus personis fuerint contestatæ et hæredibus dantur et contra hæredes transeunt."

In the present case we do not require to consider whether the executor is entitled to continue the action raised by the deceased so far as the decree for declarator of marriage is concerned, because the executor tells us that he is not going to proceed with that conclusion of the summons, and the defender does not oppose it being abandoned. I am, however, inclined to think

that in all cases where a pursuer dies after bringing an action of declarator of marriage, her executor is entitled to be sisted as pursuer so that he may continue the action. The transmissible rights of the deceased which pass to the executor, and which the executor is entitled and probably bound to enforce, might largely depend on whether she was married to the defender or not. Thus, for example, if a man died against whom a woman had brought an action of declarator of marriage, and after him the woman also died, the executors of both would be entitled to come in and insist upon the action being decided, because the executors of both would be interested in the question whether they were married persons or not. If they were not married persons the whole of the man's estate would go to his own executor; if they were married a considerable portion would go to the executor of the widow. An action of damages for seduction would admittedly pass to the executor of the pursuer who died during its dependence, and it is not, I think, doubtful that the defender would be at liberty to aver and prove that he was married to the deceased pursuer—for that would be a legitimate and conclusive defence to the claim of damages for seduction. It is, I think, a mistake to suppose that a question regarding a disputed marriage cannot be raised, tried, and decided after the death of either, or indeed both of the parties, by anyone having legitimate interest in the question. Here it is, I think, the right of the defender to have absolvitor with expenses from the declarator of marriage, unless the executor of the deceased pursuer shall establish it. The executor's right to be sisted is I think absolute.

In this case we are only concerned with the conclusion for damages. The question really is, whether the executor of a deceased pursuer of an action of damages for seduction is entitled to be sisted and pursue that conclusion, or shall be excluded from doing so because there is in the summons a prior conclusion for declarator of marriage. I see no force in the defender's argument, and am therefore of opinion the Lord Ordinary was right in sisting the executor of the deceased pursuer.

LORD TRAYNER—The mode in which the conclusions of the summons are expressed creates a difficulty in disposing of the question raised by this reclaiming-note. Read strictly, these conclusions exclude from the consideration of the Court the conclusions for damages until there has been a decision pronounced on the first conclusion. Now, on the first conclusion there has been no decision or finding of any kind, and I greatly doubt, the pursuer being dead, whether any finding can competently be pronounced thereon.

I desire to reserve my opinion on the question whether a declarator of marriage can in any circumstances be either raised or insisted in by any representative of one of the parties. But having regard to the averments and pleas of the pursuer, I think I may read the conclusion of the summons as really alternative, and in that view of the summons I am of opinion that the deceased pursuer's executor may competently be sisted to insist in the second of the alternative conclusions being one for a money claim.

LORD MONCREIFF—The Lord Ordinary has sisted the executor as pursuer, but he has practically sustained his title only to the extent of suing the second conclusion of the summons, because although he has not dismissed the action as regards the first conclusion, he only allows a proof as regards the second.

Although the second conclusion is awkwardly worded, I think it is in substance simply an alternative conclusion. After the pursuer raised the action she could have departed from the first conclusion at any time and taken up the second. The action was proceeded with because the defender refused to recognise her claims, and the pursuer having died while carrying on the action I do not see why the executor cannot now take up the second conclusion of the summons. I therefore concur.

The LORD JUSTICE-CLERK concurred.

The Court adhered.

Counsel for the Pursuer—Comrie-Thomson—W. Wallace. Agent—A. Laurie Kennaway, W.S.

Counsel for the Defender—Salvesen—Younger. Agent—Campbell Faill, S.S.C.

Friday, December 11.

FIRST DIVISION.

[Lord Stormonth Darling, Ordinary.

[Lord Pearson, Ordinary.

FOX AND ANOTHER (CARRUTHERS' TRUSTEES), PETITIONERS.

SYDNEY AND ANOTHER (ALLAN'S TRUSTEES), PETITIONERS.

Trust—Trusts (Scotland) Act 1867 (30 *and* 31 *Vict. c.* 97), *sec.* 3—*Jurisdiction—English Trust.*

The Trusts (Scotland) Act 1867 applies only to Scottish trusts. The Court of Session has consequently no jurisdiction, under section 3 of that Act, to grant power to English trustees under an English trust to sell heritage in Scotland which forms a portion of the trust-estate.

On July 17th 1896 William Fox and another, testamentary trustees of the late Archibald Carruthers, solicitor, London, presented an application to the Court, under section 3 of the Trusts Act 1867, for authority to sell certain heritage in Scotland forming part of the trust-estate.