Friday, December 9.

SECOND DIVISION.

[Lord Pearson, Ordinary.

JOHANSON *v.* JOHANSON'S TRUSTEES.

Succession—Legacy—Ademption of Legacy.

A testator died on 10th January 1896 survived by two daughters born in 1868 and 1872, and a son born in 1874. He left a trust-disposition and settlement dated 5th October 1893, in which, "considering that each of my two daughters has received from me a present of £1000," he directed his trustees to set aside and invest for behoof of his son £1000, and to apply the income thereof for his behoof until he attained the age of 25 years, when he should be entitled to the principal. The testator also directed that the residue of his estate was to be divided equally among his whole children surviving him, any advances made to the children and entered in his books to their debit, or acknowledged by receipt under their hands, being deducted from their respective shares of residue.

The testator also left in his repositories some holograph memoranda and balance-sheets which showed that he had given £1000 to each of his daughters on their attaining majority in 1889 and 1893 respectively, and that during the year prior to May 1895 the testator had given £1000 to each of his daughters and £2000 to his son, the previous gifts of £1000 each to the daughters being noted under the entries in the balance-sheet of the later gifts of like amount to them. No receipts had been given for these advances.

Held (*aff.* judgment of Lord Ordinary, and *diss.* Lord Young) that the present of £2000 to the son in 1895 was in satisfaction and discharge of the legacy of £1000 in the trust-disposition and settlement.

Succession—Testamentary Writing—Extrinsic Evidence.

Memoranda and excerpt from balance-sheet holograph of the testator *admitted* to prove testator's intention that payments made to legatee during testator's life should be in satisfaction of legacy.

Question whether parole evidence for the same purpose was competent.

Johan Laurits Johanson, 5 Hughenden Terrace, Glasgow, died on 10th January 1896 survived by two daughters, Mrs Mary Gustava Johanson or Wingate, who was born on 4th November 1868, and married James Johnston Wingate in March 1890, and Miss Clara Eleonore Johanson, born 15th December 1872, and one son, Thomas Frithjof Johanson, born 6th September 1874.

Mr Johanson left a trust-disposition and settlement dated 5th October 1893, in which he assigned and disponed to trustees his whole means and estate heritable and moveable. After providing for the payment of his just and lawful debts, sick-bed and funeral expenses, and the expenses of the trust, and for provisions to his widow, and for certain legacies, the trust-disposition and settlement contains the following provision: (fourthly) 'Considering that each of my two daughters has received from me a present of £1000 sterling, I direct my trustees to set aside and invest for behoof of my son Thomas Frithjof Johanson, the sum of £1000 sterling, paying to him, or applying for his benefit in such manner as to them shall seem good, the income thereof until the age of 25 years complete, when he shall be entitled to the principal.' By the last purpose of the said trust-disposition and settlement the trustees were directed to divide the residue equally among the truster's whole children surviving him, 'but declaring that any advances which I have made or may hereafter make to any of my children (excepting said sums of £1000 each presented to my daughters), and which are entered in my private books or memoranda to their debit, or are so acknowledged by receipt under their hands, shall be treated by my trustees as debts due by such children respectively to my estate, free of interest, and shall be taken into account in settling with my children for their respective shares of residue.'

Mr Johanson also left at the date of his death in his private repositories various holograph memoranda and documents, including, *inter alia*, the following (first):—

MEMORANDUM of ESTATE of J. L. JOHANSON, dated 1893.

J. L. JOHANSON. 1893.

Invested stocks and shares. . .	£19,882 0 0	
Cash, deposit-receipts and bank to invest . .	8000 0 0	
Do. interest to receive 1/1/94, say .	350 0 0	
		£28,232 0 0
Life insurances and bonus, say		1100 0 0
Shipping in course of sale for cash		75 0 0
Thomas Melsom, loan £50, cancelled by will . . .		0 0 0
		£29,407 0 0
House and furniture, Craigallion, Kilcreggan, say . .		1300 0 0
		£30,707 0 0
Less legacy to my son Thomas Frithjof Johanson . . . (each of my daughters having previously got £1000)		1000 0 0
		£29,707 0 0
Mrs Wingate, loans *ex* inheritance		500 0 0
Johan Johanson's (my brother's) debt to me, say . . . (when he has got abatement £5800)		6500 0 0
		£36,707 0 0
Less legacies, say . . .		800 0 0
		£35,907 0 0
House and furniture, &c. 5 Hughenden Terrace, Kelvinside, Glasgow, say		3200 0 0
		£39,107 0 0

And (second)—

EXCERPT from BALANCE-SHEET — Capital Account — of J. L. JOHANSON, No. 5 Hughenden Terrace, Kelvinside, Glasgow, as at 30th May 1895.

. . . . .

My (J. L. Johanson's) capital as at 30th May 1895 (No known debts) £34,226 17 0
28th May 1895, J. L. Johanson.

Gifts since last balance-sheet of 6th January 1894, viz.—

Mrs Jas. J. Wingate (my eldest daughter) debt to account of inheritance, cancelled £1000 0 0
(Do. previously received as on her 21st birthday, £1000)

In my possession — Miss Clara Eleonore Johanson (my daughter) £500 J. & P. Coats 4½ debentures. Div. 1/1 and 1/7 ..... £400 P. & W. M'Lellan 5 per cent. do. (insured), 1/1 and 1/7 ..... 1000 0 0

In her possession — Do. previously on her 21st birthday £1000 Merry & Cuninghame 5 per cent. debentures. Div. 31/5 and 30/11, born Hamilton 15/12/72.

Thomas Frithjof Johanson (my son)
£500 J. & P. Coats 4½ debentures. Div. 1/1 and 1/7.
£400 P. W. M'Lellan's 5 per cent. do. (insured) do. 1/1 and 1/7.
£1000 A. & J. Stewart and Clydesdale 50 shares £10 each, fully paid ordinary.
50 do. do. do. 6 per cent. cumulative preference. 2000 0 0
Dividend payable say April and October, born Hamilton 6/9/74.

£4000 0 0

Written off since last balance-sheet 6/1/94—
House furniture, 5 Hughenden Terrace £200
House property, Craigallion 100
£300
Added to surrender value of J. L. J.'s life policies for £1000 with profits 100
200 0 0
£4200 0 0

Balance at credit of my (J. L. Johanson's) capital account, on 6th January 1894 was £37,201 : 8 : 8. 28/5/95, J. L. Johanson.

Glasgow, 28th May (as at 30th May) 1895.
E. & O. E. J. L. JOHANSON.

No receipts had been given by the children for the gifts to them by the testator made during the latter's lifetime.

A question arose between Mr Johanson's trustees and Thomas Frithjof Johanson as to whether the legacy of £1000 to the latter had or had not been satisfied by the payments made to him by the testator during his lifetime. For the settlement of the point Thomas Frithjof Johanson raised an action against the trustees to have it declared that the defenders were bound to set aside and invest, for the pursuer's behoof, £1000 till 6th September 1899, when he would attain the age of twenty-five years, and to pay him the income thereof until that date, and to have the trustees ordained to do this, and also to assign to the pursuer on 6th September 1899 the investments representing the said sum of £1000.

The pursuer pleaded—"(1) On a sound construction of the said trust-disposition and settlement, the pursuer is entitled to decree in terms of the conclusion of the summons."

The defenders pleaded—"(1) The said legacy of £1000 having been satisfied by the said payments made to the pursuer by the testator in his lifetime, the pursuer is not entitled to decree."

Proof was led before the Lord Ordinary (PEARSON). The Lord Ordinary was of opinion that the parole proof showed that the gift of £2000 by the testator to the son was made in order to put the latter on an equality with his sisters, but the Inner House expresssed doubts as to the competency of such proof, and did not take it into account in deciding the question.

On 8th June 1898 the Lord Ordinary pronounced the following interlocutor:—"Assoilzies the defenders from the conclusions of the summons."

Note.—"The pursuer in this action claims to have a legacy of £1000 set aside for him, in terms of his father's will. His father died in January 1896, leaving a widow, a son, and two daughters. His will is dated in October 1893, and there are two codicils in April and May 1894, the terms of which, however, do not affect the question.

"The fourth purpose of the will is as follows:—'Considering that each of my two daughters has received from me a present of £1000 sterling, I direct my trustees to set aside and invest for behoof of my son Thomson Frithjof Johanson the sum of £1000 sterling, paying to him or applying for his benefit in such manner as to them shall seem good the income thereof, until he attain the age of twenty-five years complete, when he shall be entitled to the principal.'

"It was the fact that prior to the date of the will each daughter had received from him a present of £1000. But subsequently, in January 1895, each daughter received an additional gift of £1000. In the case of the elder daughter Mrs Wingate, this had at first taken the shape of an advance towards her inheritance, and rested on a document which made that clear. But that document was afterwards (early in 1895) returned by the testator so as to convert the advance into a gift.

"Then in the course of the same year 1895, partly in January and partly in March, he made gifts to his son amounting to £2000, and it is clearly proved not only by the parole evidence, but by the 'balance-sheets' (as they are called), in the testator's own handwriting, that these gifts to his son were in connection with and in contemplation of the gifts of like amount to the daughters.

"It is significant that in the later balance-sheets the gifts of £1000 each which the daughters had received some years previously are brought in, for no other discoverable purpose than to show that they had got £2000 each as well as their brother.

"Now these previous gifts of £1000 each are the very gifts narrated in the will as the inducing cause of the pursuer's legacy of £1000.

"I think it is impossible to resist the conclusion that the legacy of £1000 to the pur-

suer was satisfied by the testator during his lifetime, being included in the gift of £2000 made to him a few months before the testator's death. And if this be so, I do not think the effect of this is taken off by the words used by the testator to his son two months before his death, that he had got £1000 more than his sisters."

The pursuer reclaimed, and argued—The parole proof, so far as it dealt with expressions of the testator's intention during his lifetime, was quite incompetent. Even if it were competent, all it came to was this, that the testator intended to give his son and daughters equal gifts during his lifetime. He admitted that there might be writings under the testator's hand which would have been quite conclusive, but there was nothing of the kind in the present case. No mere supposition would do—there must be direct proof. The legacy of £1000 to him was left under special conditions, and a very definite expression of intention would require to be made out in order to revoke such a legacy. There was no evidence that the gift of £2000 had been made in satisfaction of the legacy; it was merely a donation during the testator's lifetime, and was not to be imputed in payment of the legacy —*White* v. *White*, January 28, 1841, 3 D. 468; *Scott* v. *Scott*, June 2, 1846, 8 D. 791.

Argued for defenders—Parole proof was competent in order to ascertain the testator's intention in making the gifts—*Mollison* v. *Buchanan*, February 22, 1822, 1 S. 346; *Griffith* v. *Bourke*, 1887, 26 L.R. Ireland, 92. If such proof were competent, it had been clearly shown that the testator's intention was to include the legacy of £1000 in the gift of £2000 made to the son before his death, and thus equalise the sum given to the daughters and the son. Even if parole evidence was not competent, the balance-sheets were entitled to be looked at, these being holograph documents, and in the same position as holograph declarations of the testator—*Robertson* v. *Robertson's Trustees*, February 15, 1838, 16 S. 554; *Pollock* v. *Worrall*, 1885, L.R., 28 Ch. D. 552. The whole scheme of the will was for absolute equality among the three children, and the balance-sheets supported this scheme, and showed clearly the intention of the testator to impute the £2000 to the payment of the legacy mentioned in the will. The cases mentioned on the other side were quite distinguishable from the present. In *Scott* the advances were small, and made by the testator for the maintenance of his daughter, whom he was legally bound to support, while in *White* the payments during the lifetime of the testator were made in order that the sons might qualify as voters, and on this account it was held that it had not been meant by the testator that a gift should be constituted. The judgment of the Lord Ordinary was sound.

At advising—

Lord Justice-Clerk—The question in this case is whether a legacy of £1000 left in his testament by a father to his son has been satisfied by a gift of the like amount made during the testator's lifetime. The evidence in the case tends to show that the testator, in making his money arrangements, had always in view that there should be equality in the distribution of what he possessed among his children. The testament expresses the legacy in question as being given to his son, on the ground that he had made a gift to each of his daughters of £1000. He appears to have gone carefully into the state of his affairs from time to time, and to have made out balance-sheets for the purpose of satisfying himself how his affairs stood. An examination of these documents tends to show that the testator when his son was coming of age gave him two sums of £1000. The two daughters were placed in the same position by (1) a gift of £1000 already referred to, and (2) a cancellation of the debt of £1000 which had been created by an advance of that amount to each of them. The testator, in the last balance-sheet, brings out that the gifts to all the children were equalised. Although what had been given to the daughters before the previous balance-sheets are not brought into the figures for summation, the testator is careful to note them, so as to indicate that they each got £2000, while the new balance-sheet states the whole sum of £2000 given to the son. In a previous balance-sheet he had expressly noted for reduction from his estate a legacy to his son of £1000, and inserts below the entry the words, "each of my daughters having got £1000," which indicates that in ascertaining a balance he was making up, not a present balance, but a balance ascertaining the sum he had to leave to his family. And this is followed up by the later sheet, in which the equality of all in receiving £2000 is noted. All this leads me to the conclusion that satisfaction was given during life for the £1000, and I find nothing in the parole evidence tending the other way. He rather confirms it. I do not think that the restriction to annual proceeds until the donee should attain twenty-five years makes any difference on the question whether the legacy was intended to equalise the gifts to the children, and that this was in fact done by the gifts expressed in the balance-sheet.

The opposite result would, I think, defeat the intention of the testator, which is, I think, expressed in his writings, that there should be equality among his children.

I therefore would move your Lordships to adhere to the interlocutor of the Lord Ordinary.

Lord Trayner—The pursuer in this case claims payment of a sum of £1000 provided to him under his father's will—a provision which he maintains has neither been revoked nor discharged. The defence is that the provision on which the pursuer founds was satisfied by the pursuer's father during his lifetime. Any difficulty which there is in the determination of this case arises from the fact that we are asked to refuse effect to a distinct provision in the deceased Mr Johanson's will, which was certainly never formally revoked by him. I have

felt the full force of this difficulty, but have nevertheless come to the conclusion that the judgment of the Lord Ordinary is right.

In considering the effect to be given to any or all of Mr Johanson's testamentary provisions, the main thing to be kept in view is his intention, and this I am prepared to gather from the language of the testamentary writing and any other writings of the testator, although not testamentary in themselves, from which that intention clearly appears. There is some parol-evidence before us as to the testator's intention, but I take no account of that. I think it would be hazardous (even if competent) to endeavour to ascertain Mr Johanson's intention from odd remarks made by him in the course of conversation with others which might easily be misunderstood, and as easily misrepresented, although spoken to in perfect good faith by those persons who repeated or professed to repeat what had been said to them. I confine my attention accordingly to what is admittedly the writ of Mr Johanson.

Now, I suppose it is not open to controversy (leaving aside for the moment the special clause on which the pursuer founds) that it was the testator's desire and purpose that his children should share equally in his succession. The will has not been laid before us *in extenso*, but the residue clause is quoted in the pursuer's record, and from it it appears that the residue of the testator's estate (the great bulk of his estate) was to be divided "equally among the truster's whole children surviving him," with the addition that any advances made to the children, and kept up against them as debts by the truster, should be deducted from "their respective shares of residue." As regards residue, therefore, forming, as I have said, the great bulk of the testator's estate, the children were to be treated on a footing of perfect equality. The clause providing for the deduction of debts only emphasises the provision as to equality. If any child had got part of the truster's estate in advance—that is, during the testator's lifetime—it was to be deducted from the shares of residue. That is, the child getting the advance was not to get it twice over—once from the testator's own hand, and again from the trustees after the testator's death.

Coming now to the particular clause on which the pursuer founds, it is, I think, clear enough from its terms what was the inducing cause which led to its being written and the provision in favour of the pursuer being made. The testator "considering that each of my two daughters has received from me a present of £1000 sterling," directs his trustees to lay aside and invest for behoof of the pursuer £1000—to apply the income thereof for behoof of the pursuer until he attained the age of twenty-five years, "when he shall be entitled to the principal." It appears from the testator's balance-sheet (as at 30th May 1895) that the presents made to the two daughters had been made to them respectively on their 21st birthday. When the testator's settlement was executed in September 1893 the pursuer was only nineteen years of age. The time therefore had not arrived for giving him a present equivalent in value to that given to each of his sisters, namely, on his 21st birthday, but the testator was anxious to provide that if he died before an equivalent present was actually made, that the pursuer should not suffer thereby, but should have £1000 laid aside for him in the manner provided, in order, when the residue came to be divided, the pursuer should get as much out of his (the testator's estate) as the two daughters. Why the testator directed the payment of the £1000 to be withheld from the pursuer until he attained the age of twenty-five we do not know, but doubtless the testator had, or thought he had, a good reason for putting this limitation on the pursuer's right. The plain object of the testator, however, in making this provision in favour of the pursuer, was to put him on a footing of equality with his sisters.

In the year 1895 the testator seems to have to some extent changed his mind. In that year (as is evidenced by the balance-sheet I have already referred to) he discharged his daughter Mrs Wingate of a debt of £1000 she owed him, and this along with the £1000 presented to her on her 21st birthday made the amount presented to her £2000. To equalise the sisters, the testator gave £1000 to his daughter Clara, which added to the amount presented to her on her 21st birthday, made her a present in all of £2000. At the same time (as recorded in the same balance-sheet) he presented the pursuer with the sum of £2000. The change in the testator's mind to which I alluded above is here shown. The testator instead of leaving to his son a sum equivalent to that which had been presented to each sister, to be paid on his attaining twenty-five years of age, delivers to him at once the sum which made him equal to his sisters in so far as the testator's bounty was concerned. Why he did this we cannot know, and need not speculate. The fact is certain, that in so far as money advanced or presented by the testator to his children was concerned, they were by his act made equal in the year 1895.

A consideration of the facts which I have thus stated leads me to the conclusion that the money presented to the pursuer in 1895 was intended to be, and was, in satisfaction and discharge of the provision on which the pursuer now claims. That provision was not intended in my opinion to give the pursuer any pecuniary advantage over his sisters. It was intended only (I think plainly) to put the pursuer on an equality with his sisters, and its purposes were fulfilled, and the provision itself sopited, when the testator in 1895 gave the pursuer in hand a sum equal to the amount which each of his sisters had received. I think therefore that the interlocutor of the Lord Ordinary should be affirmed. The view adopted by the Lord Ordinary, and in which I concur, is the same in principle as that which governed the decision in the cases of *Robertson*, 16

Sh. 554, and *Pollock* v. *Worrale*, L.R., 28 Ch. Div. 552, to which we were referred.

Two cases were cited by the pursuer in support of his case, neither of which in my view is contrary to or inconsistent with the principles given effect to in the cases already referred to. The pursuer's first case was that of *White*, 3 D. 498, in which a father who had made by will certain provisions in favour of his sons, declared that any sums advanced to his sons, or which they might owe him at his death, were to be imputed towards payment of their provisions. Afterwards he purchased for each son a voting qualification, and the question was whether the prices paid for these qualifications were to be treated as an advance and deducted from their provisions. The Court answered this question in the negative, holding that the qualification was a gift by the father, and not an advance or debt in the sense of the settlement. Lord Medwyn observed—"This is a question of intention which we are to gather from Mr White's settlement and the other documents." The other case was that of *Scott*, which was treated as a very special case. But the majority of the Court held that advances made by a father to his daughter were not to be imputed towards extinction of a provision he had made in her favour, because it was not proved that that was his intention.

Accordingly these two cases were decided (also the other two cited for the defenders) on the presumed or proved intention of the testator. It is because I am satisfied that Mr Johanson intended the present of £2000 given to the pursuer to be in satisfaction and fulfilment of the provision in the will that I have come to the same conclusion as the Lord Ordinary.

Lord Moncreiff was absent at the advising, but the Lord Justice-Clerk read his opinion as follows:—I have come to the conclusion that the Lord Ordinary is right in holding that the legacy of £1000 to the pursuer under his father's will was satisfied during the father's lifetime by gifts made to the pursuer.

The scheme of the will is equality. The residue is to be divided among the children equally. The special legacy of £1000 bequeathed to the pursuer under the fourth purpose of the settlement is left to him expressly upon the ground that each of the daughters had already received a gift of like amount. It is said that this did not produce equality, because it is provided, as regards the pursuer's legacy, that he should only receive the income of it until he should attain the age of twenty-five. But this does not, I think, affect the consideration that the legacy is bequeathed as the counterpart of the gifts of like amount to the daughters.

The documentary evidence, especially the balance-sheets, confirms the view that it was the truster's intention throughout to preserve equality among his children in regard to gifts made to them. At the date of the will the pursuer was not of age, but he attained the age of 21 in September 1895. In anticipation of that event his father, in May 1895, gave him £2000 in two sums of £1000. Each of the truster's daughters had previously received £1000 as a gift and also a like amount as an advance, but in May 1895 the truster appears to have cancelled these advances as debts, with the result that each of the daughters and the pursuer had as at that date received as a gift in all £2000. It seems to me that the purpose of the balance-sheet was to bring together the whole of the gifts which the truster had as at that date made to his children. There was no necessity for referring to the gifts of £1000 made to the daughters on their attaining majority if the truster only desired to note the gifts made since the last balance-sheet. His object plainly was to show that all his children had received gifts of equal amount.

I am therefore of opinion that as his object in bequeathing a legacy of £1000 to the pursuer was simply to put him on a footing of equality with his sisters, and as that result was attained by the gifts subsequently made to the pursuer the fair conclusion is that the legacy was satisfied.

Lord Young—I think that the question here is not unattended with difficulty. It is a question as to whether there has been ademption of a legacy. The doctrine of adeeming a legacy left by a formal will is in itself full of difficulty in application, because it is a rule of our law that if anything is done by a deed, of which a legacy in a formal will is an example, it must be fulfilled unless discharged by another deed, or by something that shows the discharge as distinctly as the original deed shows what is said to have been discharged. The doctrine of ademption was adopted into our law from that of England. I do not mean to say anything against that doctrine. It simply comes to this, that when a testator leaves a legacy to anyone, and afterwards in his lifetime makes a payment to that person in such a manner and in such circumstances as to satisfy the Court judicially that the payment was intended as a discharge of the legacy—a prepayment of it for the convenience of the legatee—such a discharge will be given effect to. The most familiar example is when the legacy is given for a purpose and that purpose is satisfied during the lifetime of the testator, this is to be taken as a prepayment of the legacy, as it is not to be presumed that he meant to pay twice.

The question to be decided in the present case is, whether it has been proved to our satisfaction that the testator paid during his lifetime £1000 to the pursuer, intending the legacy of that sum in his will to be discharged by the payment. I should have had difficulties as to that irrespective of the special clause in the will to which I shall draw attention, because it is no part of the present case that this legacy was given for a specified purpose. There may be in the will what indicates an intention that the estate should be divided equally among the children. But if that were the intention of the testator, I do not see any

necessity at all for legacies to the children. And even if it may have been an intention on the part of the testator in 1893 that there should be equality of division, I know of nothing to show that that was his intention at his death, and a will is, speaking generally, to be read as of the date of the testator's death. I know of nothing which can lead me to the conclusion that he then intended an equal division of his estate among his children, and that anything he might give to his daughters for their dress, or to his son to enable him to travel or the like, should be taken into account so as to produce that equality.

But the will contains a special clause which informs us as to how the intention of the testator as to gifts to his children in his lifetime is to be reached. This clause is as follows:—"But declaring that any advances which I have made or may hereafter make to any of my children (excepting said sums of £1000 each presented to my daughters), and which are entered in my private books or memoranda to their debit, or are so acknowledged by receipt under their hands, shall be treated by my trustees as debts due by such children respectively to my estate free of interest, and shall be taken into account in settling with my children for their respective shares of residue." This clause does not apply universally to all payments to the children during the testator's lifetime. It applies only to those which have been entered by the testator to their debit, and for which receipts have been taken. The gift in question to the son was not entered to his debit in the testator's books, and no receipt was taken from him. There is therefore in the clause quoted no expression of intention on the part of the testator that it is to be taken into account in arriving at an equal division.

I have therefore arrived at a different conclusion from your Lordships with considerable misgivings, having regard to the opinions which your Lordships have expressed. I have expressed myself as I have done because I think it is important that my views on ademption should be known.

The Court adhered.

Counsel for Pursuer—Guthrie, Q.C.—Graham Stewart. Agents—Cairns, M'Intosh, & Morton, W.S.

Counsel for Defenders—Campbell, Q.C.—Gray. Agent—Thomas Liddle, S.S.C.

Tuesday, December 13.

FIRST DIVISION.

[Lord Kincairney, Ordinary.

CORSTORPHINE *v.* KASTEN.

Process—Citation—Foreigner—Citation of Foreigner at Dwelling-House within Forty Days of Departure—Act 1540, *cap.* 75—*A.S.* 14*th December* 1805—*Judicature Act* 1825 (6 *Geo. IV. cap.* 120), *sec.* 53.

Jurisdiction which has been acquired over a foreigner by forty days' residence in Scotland, ceases on the foreigner leaving without retaining a residence, and citation within a period of forty days thereafter at what was his residence during his stay in Scotland, under the Act 1540, c. 75, is invalid, and is not cured by using arrestments *jurisdictionis fundandæ causa.*

Judgment of the Lord Ordinary in *International Exhibition.* v. *Bapty*, 1891, 18 R. 843, *overruled.*

Process—Citation—Foreigner—Objection to Citation by Party Appearing in Action—Court of Session Act 1868 (31 *and* 32 *Vict. cap.* 100), *sec.* 21.

Section 21 of the Court of Session Act of 1868 provides that no party appearing in an action in the Court of Session shall be entitled to state any objection "to the regularity of the execution or service as against himself of the summons."

A foreigner who had resided temporarily in Scotland, but had quitted the country, was improperly cited on seven days' induciæ at the dwelling-house he had occupied in Scotland, instead of being cited edictally on fourteen days' induciæ. He defended the action and objected to its competency on the ground of these errors in procedure.

Held that the defender's objections fell within those excluded by the statutory provision.

By the Act 1540, cap. 75, it was provided that the officer must go to the "principal dwelling-place" where the person to be summoned "dwells, and has their actual residence for the time," and if he cannot find him personally he is to show his precept to a servant and leave a copy with the servant. Failing his getting entrance, the officer is to fix a copy at the door, which is to be "sufficient summoning and delivering of the copy."

By A.S. 14th December 1805 it is provided "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 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 per-