LORD TRAYNER—I agree. I think that the view which the Sheriff-Substitute took was the right one. The pursuer might have brought an action at common law or under the Employers Liability Act, but he did not do so, and it appears that from 29th August 1898 (a fortnight after he received the injury complained of) down to two days before the raising of the present action he was receiving payments from his master nearly equal in amount to the maximum sum obtainable by him under the Workmen's Compensation Act. He says these were merely payments to account of what was due to him at law. He cannot take up that position now. The receipts granted by him for these payments bear to be granted as "in full satisfaction of the amount due to him as compensation under the Workmen's Compensation Act," based on his average weekly earnings, "in accordance with the said Act."

If any valid objection had been stated to the receipts, — if the pursuer could have stated any relevant ground for setting them aside — the case might have been different. But if nothing of that kind is said—and it is not said here—then these discharges must stand against him according to their terms, and according to their terms they are a bar to this action going on.

I am of opinion that the pursuer must be held to have exercised his option, and I therefore agree with your Lordships that this action should be dismissed.

LORD YOUNG and LORD MONCREIFF were absent.

The Court pronounced this interlocutor:—

"Recal the interlocutor appealed against, as also the interlocutor of the Sheriff-Substitute of Lanark, dated 9th May 1899: Sustain the fourth plea-in-law for the defender: Dismiss the action: Remit to the Sheriff to determine the amount due to the pursuer under the Workmen's Compensation Act 1897, and decern: Find the respondents entitled to expenses in this and in the Inferior Court," &c.

Counsel for the Pursuer—A. S. D. Thomson. Agents—J. Douglas Gardiner & Mill, S.S.C.

Counsel for Defenders — W. Campbell, Q.C. — Chisholm. Agents — Anderson & Chisholm, Solicitors.

Friday, January 12.

SECOND DIVISION.

[Sheriff-Substitute at Edinburgh.

M'MAHON *v.* MATHESON.

(*Ante*, 36 S.L.R. p. 704.)

Executor—Decree Against Executor—Construction of Decree — Admissibility of Evidence to Construe Decree.

A small-debt summons was raised against "J. M., commission agent, 21 Guthrie Street, Edinburgh, trustee and sole executor on the estate of the deceased Mrs J. W., . . ., defender." The decree following thereon found "the within designed J. M., as libelled, defender, liable" for the sum sued for.

The pursuer proceeded upon this decree to poind certain articles of furniture, the private property of J.M. In a process of interdict against sale under the poinding a proof was allowed, from which it appeared that J.M. had no trust funds in his hands either at the date of the decree or at the time when the debt due by the deceased was first intimated to him.

Held that *ex facie* the decree was to be construed as a decree against J.M. as trustee and executor, and not as an individual, and that this construction had not been displaced by the proof.

This is a sequel to the action reported *ante*, vol. xxxvi. p. 704, and 1 F. 896.

The proof allowed by the interlocutor of Court of 7th June 1899 was taken before the interim Sheriff-Substitute (HARVEY), who on 13th November pronounced the following interlocutor:—"Finds in fact (1) that the deceased Mrs Jane Smith or Charlton or Ward, formerly residing at 5 South College Street, Edinburgh, died on 17th July 1897; (2) that the pursuer in the present action was duly confirmed executor-nominate upon the estate of the said deceased Mrs Ward, and was the sole accepting trustee under her trust-disposition and settlement; (3) that by minute dated 16th August 1897 he appointed W. R. Mackersy, W.S., to be law-agent in the trust; (4) that the sole beneficiary under the said trust was Miss Mary Elizabeth Ward, daughter of the said deceased Mrs Ward; (5) that the trustee having duly made up a title in his own name, by disposition dated 13th and recorded 14th December 1897, disponed and conveyed the heritable estate falling under the trust to Miss Ward; (6) that the executry funds were uplifted and administered by Mr Mackersy, and were never in the personal possession of the trustee; (7) that by discharge, dated 9th March 1898, proceeding upon accounts duly audited, the trustee was discharged of his intromissions and actings with the executry funds by Miss Ward; (8) that after the date of this discharge neither the trustee nor his agent had any executry or trust-estate in his possession; (9) that no notice is proved to have

been received either by the pursuer or by the said agent in the trust of the defender's claim upon the trust-estate until June 10th 1898; (10) that an action was raised by the present defender for payment of the said claim in the Small Debt Court against the present pursuer on 16th October 1898, and that decree was pronounced therein on 26th October following; (11) that the warrant for the poinding and sale, against which interdict is craved in the present action, was contained in the said decree, and that the subjects poinded were the personal property of the present pursuer: Finds in law that the said decree cannot be construed as a decree against the present pursuer as an individual, and that it does not constitute a valid warrant for the poinding and sale of his private property: Therefore grants interdict as craved: Declares the same to be perpetual, and decerns," &c.

Note.—"1. As regards the result of the proof led before me, I find that the defender has failed to show that his claim against the trust-estate was intimated to the trustee or to his agent Mr Mackersy, or was otherwise brought to their knowledge, prior to the 10th of June 1898, when Mr Mackersy received the letter of that date. The defender says he posted an earlier intimation to Mr Mackersy on 9th September 1897, and there is an entry in his books to this effect. Mr Mackersy denies that he received this letter, and I do not think his evidence is rebutted merely by proof of the fact that a letter was posted to him. I also think there is nothing in Mr Mackersy's books or in the evidence to contradict his statement that he was not aware that any other doctor than Dr Donald (whose account has been paid) attended Mrs Ward in her last illness.

"(2) As regards the date at which the trustee parted with the trust-estate, there is a distinction between the part of it which was heritable and the executry. The former consisted of the house previously occupied by Mrs Ward at 5 College Street. This was transferred to Miss Ward in terms of her mother's settlement by disposition, dated 13th and recorded 14th December 1897, and I can see no grounds, and none are stated, on which this transfer could be challenged as a breach of duty on the part of the trustee to the creditors of the deceased. If the defender's claim had been timeously made there were ample executry funds to meet it without trenching on the heritable estate. After the disposition of 13th December this property no longer formed part of the trust, and it is clearly irrelevant to attempt (as the defender does) to trace what became of the price. In point of fact the property was sold after it came into Miss Ward's hands, and the price was paid to Mr Mackersy as her agent. At the proof I refused, in accordance with the views just stated, to order Mr Mackersy to produce his accounts with Miss Ward for the purpose of showing how he accounted to his client for this money.

"The executry estate was recovered and administered not by the trustee directly but by Mr Mackersy, as agent of the trust, and on 9th March 1898 the beneficiary Miss Ward granted a discharge to the trustee of his actings and intromissions. The accounts, which were duly audited, bring out a balance in favour of the trustee of £5, 19s. 7½d. I do not think this discharge can now be challenged by the defender, or that it is relevant for him to show (as he attempts) that there is a mistake in the accounts in favour of the trustee to the extent of which he must still be held to hold trust-funds. The trustee was entitled in the absence of claims by creditors, and after six months, to transfer the balance, if any, to the beneficiary, and if she is satisfied that this has been done, and has granted a discharge, that is conclusive of the matter. A sufficiently anxious scrutiny might disclose a compensating error the other way. I therefore hold in fact that no trust-funds were in the trustee's hands subsequent to 9th March 1898, a date prior to the first intimation he had of the defender's claim. Nor do I think that either as regards the heritable or moveable estate was there any impropriety as regards the time at which the transfers were made.

"(3) The facts established by the proof may be used for two purposes—First, to aid in the construction of the small-debt decree, and, Second, after this is fixed, to determine its effect in validating diligence. The competency of using evidence of this kind to interpret the decree seems to be implied in the case of *Jaffray* v. *Gordon* (10th February 1831, 9 S. 416), and if I have rightly interpreted the evidence in this case it shows that there was no ground upon which a decree against the trustee as an individual could be justified. It must, therefore, be held that the decree was directed against the present defender as trustee merely, and imposed upon him liability only to the extent of the trust-funds at the date of the decree. As there were none it could impose no liability, and the diligence used upon it was without warrant. Whether, if there had been trust-funds, diligence could competently have been directed against the personal effects of the trustee is a question of difficulty, which in the view I take of the facts it is not necessary to determine."

The following entry occurred in Mr Mackersy's business journal for business done on account of Mrs Ward's trust—"Nov. 11, 1897. Writing Dr Donald in answer in regard to his claim, and that I have shown same to Miss Ward, who stated that you could not have any claim upon this estate as your account had been paid, and immediately thereafter Dr Matheson was called in to attend; and that he might give me his explanation in regard thereto." The letter sent by the defender to Mr Mackersy on 10th June 1898 was in the following terms—"I shall feel obliged if you will let me know when the estate of the late Mrs Ward, 5 College Street, is likely to be wound up; I understand you are the agent." On 2d September 1898 another letter was sent by the defender to Mr Mackersy in the following terms—"I wrote to you some time ago in regard to my account

against the estate of the late Mrs Ward, College Street. You did not answer my letter; will you kindly do so within three days, otherwise I shall give the matter into the hands of my agent." Mr Mackersy received both these letters but replied to neither.

The defender appealed, and argued — Under the decree in question the pursuer was personally liable. The decree being in the Small Debt Court a personal decerniture against him must have been meant, and not a decree against him in his representative capacity. The form of a small-debt decree was prescribed by the statute, and in inserting the words "as libelled" the Sheriff-Substitute had gone beyond his powers. The case was ruled by the case of *Jaffray* v. *Gordon*, February 10, 1831, 9 S. 416, which was exactly in point. Even if it were held that it was competent to sue a trustee in the Small Debt Court in his representative capacity, that had not been done here. M'Mahon had not been sued "as trustee," and the omission of the word "as" made the designation personal—*Graham* v. *Macfarlane & Co.*, March 11, 1869, 7 Macph. 640. The proof disclosed that the trustee held trust-estate in his hands, or at least that he had parted with it to the beneficiary without providing for all debts due by the executry estate. The evidence of Dr Matheson and the entry in his books, taken along with the excerpts in Mr Mackersy's business journal, conclusively showed that the trustee's agent, before the trust-estate was wound up, must have been aware that Dr Matheson had a claim against the trust-estate. [LORD JUSTICE-CLERK—Mr Mackersy's business journal only shows that Dr Matheson was called in to attend on Miss Ward, but he might very well have been paid a consultation-fee on the spot. In his letter of 2nd September 1898 Dr Matheson referred to his account, and the trustee's agent had never repudiated having received it till after the action was raised. In these circumstances the trustee must be held to have paid away the estate to the beneficiary without taking due care to see that all claims against the trust-estate were provided for; he was therefore liable — *Lamond's Trustees* v. *Crum*, March 8, 1871, 9 Macph. 662, opinion of Lord President Inglis, 668.

Argued for pursuer — The small-debt action was brought and the decree was granted against him in his representative capacity, and the use of diligence against his private estate was incompetent. This had been authoritatively settled by *Craig* v. *Hogg*, October 17, 1896, 24 R. 6. A trustee could be legally sued in his representative capacity under the Small Debt Act. The word "as" before trustee was immaterial; if a defender was designed trustee or executor of some-one, the action was brought against him in his capacity of trustee or executor, and diligence following on such an action used against his personal property was without any warrant at all — *Wilson* v. *Mackie*, October 22, 1875, 3 R. 18. The case of *Jaffray* was very special. It was the case of a trustee on a sequestrated estate, and from the session-papers it appeared that he had become personally liable as cautioner. If the case had any bearing it had been overruled by *Craig*, *supra*, which was a decision of seven judges finally settling the law on the subject. The proof had been allowed only with a view to discover whether the trustee had any trust-estate in his hands when he first became aware of Dr Matheson's claim. It had been conclusively proved that the first intimation of Dr Matheson's claim which the trustee had received was on 10th June 1898, which was eleven months after the truster's death and three months after the trustee's discharge.

LORD TRAYNER—I think it a great pity that there should have been so much litigation as there has been over an account for £3, 10s., but I am of opinion that the interlocutor now under review is well founded. The claim made by Dr Matheson is against the executor of his patient. Now, being a debt against the executry estate, the executor in the due administration of the estate is bound, if he has funds, to pay it. At the date of Mrs Ward's death, and at the date of the discharge of the executor, there were sufficient executry funds to pay this claim if it had been duly intimated. Mrs Ward died in July 1897; the executor was discharged on 9th March 1898, having accounted for his whole intromissions with the executry estate to the single beneficiary entitled to take up the succession. He ceased from that moment either to have an official position in connection with the estate or to have any executry funds in his hands for which he was bound to account. He had accounted for all the funds he had received. Accordingly, after 9th March 1898 he had no executry funds to meet any claim that might be presented against the executry In these circumstances it is plain that Mr M'Mahon is not personally liable in any debt which formed a claim against the estate unless he had behaved improperly in the administration of the estate which was under his charge as executor. Now, did he do that? If he had received notice of Dr Matheson's claim anterior to the period of his settling up the executry accounts without providing for it he would have been acting improperly. The question therefore comes to be, whether the account or claim by Dr Matheson was made or intimated anterior to that date. Now, I am satisfied upon the proof that Dr Matheson has failed to show that the account was rendered. When I say that I do not mean to throw any doubt upon the honesty of Dr Matheson's evidence. I think he is either under a mistake when he says he rendered the account or that the document which he says he rendered in September 1897 had been sent to some improper address or had fallen aside and never been dispatched at all. Certainly it never reached the hands either of the executor or the law-agent who was administering the estate for the executor. I think that view, which I should be compelled to take upon the mere parole testimony if there was nothing

else, is supported by the consideration of two letters which Dr Matheson wrote to the agent of the executor at a subsequent date, because, as was pointed out in the course of the debate, these letters do not make any reference whatever to a previous rendering of the account. The first letter of 10th June 1898 says—[*reads*].

Now, I read that as meaning "I understand you are winding-up Mrs Ward's estate as the agent; when will it be wound up?' I think that is the most likely form in which anyone would put the question who had or might have a claim to render, and who wished to do so before the estate was wound up, but it is not indicative of his having, months before that, already rendered an account to which no attention had been paid. The second letter says—[*reads*]. There is there a reference to an account, and that letter was not answered. I do not wonder at that, because in a very small succession of this kind the law-agent did not probably want to write more letters than were necessary, and he had nothing to say about the account, because by September 1898 the executor had been discharged, and the executry estate was wound up and done with. Therefore, if I take these two letters by themselves, I cannot regard them as affording any corroboration of Dr Matheson's statement that he had sent in his account in September 1897. If Dr Matheson did not render his account until 10th June 1898, then the estate had been wound up and the executor discharged. I am of opinion, therefore, that as Dr Matheson has no claim against the executor upon any ground other than that of improper administration of the executry estate, he has failed to show that upon that ground he has a claim for the payment of which Mr M'Mahon is now personally responsible. I regard that as sufficient for the decision of the case, but it is right I should say a word with regard to the more technical question of the construction of this decree. While I would be disposed to look at the decree liberally in the interests of the pursuer, I think, having regard to the judgment in *Hogg* v. *Craig* (from which I dissented, but which I am nevertheless bound to regard as authoritative), it is not possible to read this decree, as expressed, as meaning anything else than a decree pronounced against the defender in his representative capacity as executor. The decree finds and decerns against the within designed James M'Mahon. Now, the within designed James M'Mahon is undoubtedly the James M'Mahon who resides at certain places, but he is also—and that is the ground of the action—the trustee and sole executor of the late Mrs Ward. You cannot separate the designation of James M'Mahon into two parts; you must take him as the pursuer gives it; and the pursuer designs the defender as trustee and sole executor. I do not proceed to any extent upon the words "as libelled" which have been added by the Sheriff to the statutory form (whether that is warrantable or not I do not say), but if the words are to be read at all, they, from the position in which they stand, strengthen the view that the Sheriff was limiting the decree to a decree against the within designed defender as he was libelled—that is, as executor. Upon the whole matter I think the Sheriff-Substitute reached a right conclusion, and that we should adhere to his judgment both in law and in fact.

LORD KINCAIRNEY—I come to the same conclusion as Lord Trayner, and concur in and adopt his observations as to the purport and effect of the proof and the letters. What occurs to me however is, that we are not considering whether the respondent should be found liable personally or only as trustee. That question has already been decided by the Sheriff-Substitute in the Small Debt Court, and the decree has not been challenged as incompetent. What we have now to do is only to construe that decree with such assistance in the construction of it as the proof affords. If the decree were against the respondent personally it would not signify whether he had trust-funds in his hands or not. That would have signified only if the decree were against him as trustee. Now, I think that the decree is, according to its natural construction, a decree against the respondent as trustee. I attach some importance to the addition of the words "as libelled" to the statutory form. The designation of the respondent, and the character in which he is sued, *i.e.*, trustee and executor, are given in the summons and the decree as against "the within designed James M'Mahon as libelled." I cannot put any meaning on the words "as libelled" unless I read them as referring to M'Mahon's trust-character. I find nothing in the proof tending in the least to displace that construction. Reading the decree as a decree against the respondent *qua* trustee, I am satisfied, for the reasons stated by Lord Trayner, that the respondent was not possessed of trust-funds, and had not parted with them in disregard of the rights of the creditors.

LORD JUSTICE-CLERK—I entirely concur in your Lordships' judgment that Dr Matheson has failed to prove what he endeavoured to prove, namely, that his account was lodged before the winding-up of the executry estate; and as regards the judgment pronounced I agree in what has been said, and I do not think it necessary to add anything more except that I consider this to be a lamentable litigation. This gentleman, I suppose, could have had no difficulty, and it is not suggested that he would have had any difficulty, in getting payment of his account from the beneficiary who had got possession of the estate. Instead of that, he has carried on this litigation for a considerable time to his own great loss. I do not suppose it would have been any gain to him whatever, even if he had been successful, probably the reverse.

LORD YOUNG and LORD MONCREIFF were absent.

The Court pronounced this interlocutor:—

"Dismiss the appeal: Find in fact and in law in terms of the findings in fact and in law in the said interlocutor appealed against: Therefore of new grant interdict as craved, and declare the same to be perpetual, and decern."

Counsel for Pursuer—Kennedy—A. M. Anderson. Agent—W. R. Mackersy, W.S.

Counsel for Defender—Salvesen, Q.C.—T. B. Morison. Agents—P. Morison & Son, S.S.C.

HIGH COURT OF JUSTICIARY.

Saturday, January 13.

(Before the Lord Justice-Clerk, Lord Trayner, and Lord Moncreiff.)

NORTH BRITISH RAILWAY COMPANY AND OTHERS *v.* DUMBARTON HARBOUR BOARD.

Justiciary Cases—Appeal — Competency — Civil or Criminal—Summary Procedure Act 1864 (27 *and* 28 *Vict. c.* 53), *sec.* 28.

The Summary Procedure Act 1864 enacts (sec. 28)—"In all proceedings by way of complaint instituted in Scotland in virtue of any such statutes as are hereinbefore mentioned, the jurisdiction shall be deemed and taken to be of a criminal nature where, in pursuance of a conviction or judgment upon such complaint, or as part of such conviction or judgment, the Court shall be required or shall be authorised to pronounce sentence of imprisonment against the respondent, or shall be authorised or required, in case of default of payment or recovery of a penalty or expenses, or in case of disobedience to their order, to grant warrant for the imprisonment of the respondent for a period limited to a certain time, at the expiration of which he shall be entitled to liberation; and in all other proceedings instituted by way of complaint under the authority of any Act of Parliament the jurisdiction shall be held to be civil."

Held (*diss.* Lord Moncreiff) that where an incorporated company, against which a sentence of imprisonment cannot be pronounced, is charged with a statutory offence, the jurisdiction is civil and not criminal within the meaning of sec. 28, and that an appeal to the High Court of Justiciary is incompetent.

The North British, Caledonian, and the Lanarkshire and Dumbartonshire Railway Companies, as proprietors of the Dumbarton and Balloch Joint-Line, were charged in the Sheriff Court of Dumbarton, on a complaint at the instance of the Dumbarton Harbour Board, with a contravention of sec. 69 of the Dumbarton Harbour Act 1881, "whereby they are liable to forfeit a sum not exceeding £10, and in default of payment thereof with expenses . . . to execution by poinding and sale in terms of sec. 131 of the Lands Clauses Consolidation (Scotland) Act 1845, which Act is incorporated with the said Dumbarton Harbour Act 1881, in terms of section 2 of said last-mentioned Act."

The Sheriff-Substitute (GEBBIE) convicted the appellants and imposed a fine of £2, 2s. with £2, 2s. of expenses.

The appellants having obtained a case, the respondents objected to the competency of the appeal, on the ground that the proceedings were of a civil and not of a criminal nature within the meaning of sec. 28 of the Summary Procedure Act 1864.

Argued for the respondents—This was an appeal under the Summary Prosecutions Appeals (Scotland) Act 1875, which by sec. 7 adopted the criterion provided by sec. 28 of the Summary Procedure Act 1864 for determining the appropriate court of review. Section 28 declared the jurisdiction to be of a criminal nature where the Court was required or authorised by the special statute to pronounce sentence of imprisonment either *in modum poenæ*, or in default of payment of a penalty—*Cummings* v. *Wood*, October 30, 1893, 1 A. 104. The proceedings here did not fall within that definition. In the Dumbarton Harbour Act libelled there was no provision for recovery of the penalty, and under the Lands Clauses Act 1845 the only competent mode of execution was by poinding and sale. Under this complaint, therefore, the Court was not required or authorised to pronounce sentence of imprisonment. The provision of sec. 8 of the Summary Jurisdiction Act 1881, which authorised a warrant of imprisonment in default of recovery by poinding and sale, did not touch the present complaint, because the complainers had specified a particular mode of execution, viz., poinding and sale, and no other could competently be pronounced. That circumstance distinguished the case from *M'Ewen* v. *Abinger*, Jan. 19, 1894, 1 A. 314; *Mackenzie* v. *Cadenhead*, Dec. 17, 1897, 2 A. 443. Further, the respondents were an incorporated company against whom a sentence of imprisonment could not competently be pronounced. The inquiry, in the words of sec. 28, was whether imprisonment could follow "in pursuance of a conviction upon such complaint." It was therefore necessary to have regard to the particular complaint and the circumstances of the respondent. Here no such sentence could follow, and therefore the case was not within the definition. That view was supported by the words of sec. 19, which authorised imprisonment in place of poinding in all cases "in which the respondent is liable to be imprisoned," which was not the case here. The appeal was therefore incompetent.

Argued for the appellants—The proceedings were criminal, within the meaning of sec. 28. The Summary Procedure Act applied to all statutory prosecutions, and the test was whether imprisonment for a fixed