conduct in a wife towards her husband?] She was justified in her attitude by his previous conduct towards her. The defender also founded upon the letters as showing that the pursuer had no *bona fide* desire for his wife's return, and had made no adequate efforts to secure it, and argued that this was, apart from any other reason, sufficient ground for refusing him decree of divorce for desertion—*Watson* v. *Watson*, March 20, 1890, 17 R. 736.

Counsel for the respondent were not called upon.

LORD JUSTICE-CLERK—We have had a clear statement from Mr Hunter, and everything has been said on behalf of the defender which could have been said. But I have come to the conclusion—and I must say without difficulty—that there are no grounds for interfering with the Lord Ordinary's interlocutor. I entirely concur in his judgment, and in the reasons which he has given for it. I do not think that it would be for edification that I should enter further into the details of the case. There is, however, one observation which I would like to make. I certainly agree with what the Lord Ordinary says as to the Ashbourne incident. If the pursuer erred upon that occasion, I think he committed an error of judgment only. I am not satisfied that he committed even an error of judgment. He was in a difficult position, and apart from the lateness of the hour his conduct does not appear to me to be open to criticism. He had, I hold, a duty to do. It was a duty requiring, if it was undertaken, a certain amount of firmness. If he believed that his wife was affected in her mind, then his position was a difficult and painful one. In dealing with a person in such a state it may be necessary, in view of the disorder of mind, to exercise firmness in a way that might not be right where there was no mental affection. The same law which takes away the personal liberty of a person of diseased mind, necessarily implies that some interference with liberty is permissible by a husband or father or other near relative in order to secure proper care and treatment. And in exercising such firmness it is very difficult to draw strict lines of limit. In this case I think that the pursuer did not exceed the limits of discreet firmness. But I am further satisfied that in any view he acted in good faith. I do not think it is necessary for me to comment otherwise upon the evidence.

LORD M'LAREN—I am also entirely satisfied with the Lord Ordinary's interlocutor, and have nothing to add.

LORD TRAYNER—I concur.

LORD YOUNG and LORD MONCREIFF were absent.

The Court adhered.

Counsel for the Pursuer—W. Campbell, Q.C.—Craigie. Agent—A. W. Gordon.

Counsel for the Defender—W. Hunter. Agent—William Duncan, S.S.C.

Wednesday, January 24.

FIRST DIVISION.

[Lord Kyllachy, Ordinary.

JOHNSTON *v.* JOHNSTON, *et e contra.*

Trust—Trustee—Petition for Removal—Absence from United Kingdom—Outer or Inner House—Trusts (Scotland) Amendment Act 1891 (54 *and* 55 *Vict. cap.* 44), *secs.* 2 *and* 8.

Under section 2 of the Trusts Act 1891 it is provided that "'the Court' shall mean any court of competent jurisdiction in which a question relative to the . . . removal of a trustee comes to be tried." Section 8 provides that where a trustee under a *mortis causa* trust becomes incapable of acting by reason of continuous absence from the United Kingdom for a period of six months or upwards, he may be removed from office on application by a co-trustee, to be made "either to the Court of Session or to the Sheriff Court from which the original confirmation of the trustees as executors issued."

Held that "Court of Session" for the purposes of the section is not limited to the Inner House, and that such an application may competently be made in the Outer House.

Section 2 of the Trusts (Scotland) Act 1891 (54 and 55 Vict. cap. 44) provides that "For the purposes of this Act . . . the expression 'the Court' shall mean any court of competent jurisdiction in which a question relative to the actings, liability, or removal of a trustee comes to be tried." Section 8 provides that "In the event of any trustee being or becoming insane or incapable of acting by reason of physical or mental disability, or by continuous absence from the United Kingdom for a period of six calendar months or upwards, such trustee . . . may, on application in manner hereinafter mentioned by any co-trustee or any beneficiary in the trust estate, be removed from office upon such evidence as shall satisfy the Court of the . . . continuous absence of such trustee. Such application, in the case of a *mortis causa* trust, may be made either to the Court of Session or to the Sheriff Court from which the original confirmation of the trustees as executors issued, and in the case of a marriage-contract may be made either to the Court of Session or to the Sheriff Court of the district in which the spouses are, or the survivor of them is domiciled, and in all other cases shall be made to the Court of Session." Section 11 of the Trusts (Scotland) Act of 1867 (30 and 31 Vict. cap. 97) provides for, *inter alia*, the assumption of new trustees with the consent of the Court, in the event of trustees being incapable of acting from continuous absence for six months or upwards. Section 16 provides that applications to the Court under the Act are to be by petition "in the first instance before one of the Lords Ordinary officiating in the Outer House."

General Johnston of Carnsalloch, Dumfries, by trust-disposition dated 28th September 1891, disponed his whole estates to his brother Patrick Francis Campbell Johnston and his three nephews, Captain Archibald Francis Campbell Johnston, Augustine Campbell Johnston, and Conway Campbell Johnston, as trustees, for the purposes set out in the trust-disposition.

General Johnston died in December 1891, and Patrick Francis Campbell Johnston in March 1892. The truster's three nephews accepted office and entered into possession of the estates.

A petition was presented in the Outer House on July 18, 1899, by Captain Archibald Johnston, craving the Court to remove the other two trustees from office "on account of their continued absence from the United Kingdom as alleged."

The petition was presented under and in virtue of the Trust Acts, and in particular under section 8 of the Trusts Act of 1891.

The petitioner averred, and it was not disputed, that the respondents had been continuously absent from the United Kingdom for more than six months. He further averred that owing to their absence and to the fact that they would not act with him in the trust, he found it impossible to carry on the administration of the trust-estate. Answers were lodged by the respondents, who stated that they intended not to reside permanently out of the United Kingdom, and that they had only been absent on business which would shortly be completed.

The Lord Ordinary (Kyllachy) on 22nd November 1899 pronounced the following interlocutor:—"Finds that it sufficiently appears that the trustees Augustine Campbell Johnston and Conway Campbell Johnston are abroad, and have been continuously absent from the United Kingdom for more than six calendar months, and that their absence from the country incapacitates them from the due performance of their duties under the trust: Therefore removes them in terms of the prayer, and decerns *ad interim*."

The respondents reclaimed.

On 23rd December 1899 the respondents in the first-named petition presented a petition in the Bill Chamber for the sequestration of the trust-estate and appointment of a judicial factor.

The Lord Ordinary (Pearson) reported this petition to the First Division.

Argued for reclaimers — The petition could not be competently presented in the Outer House, the Inner House being the only competent tribunal. If a statute referred to the "Court of Session," that meant the Inner House.—*Tod* v. *Marshall*, October 23, 1895, 23 R. 36; *Mitchell*, July 20, 1864, 2 Macph. 1378. There being an imperative direction, it was not legitimate to refer to the provisions of the Act of 1867, and argue that by reading the two Acts together it appeared that a petition might be presented in the Outer House.

Argued for respondent—It had been the practice to present such petitions in the Outer House—*Lees*, May 30, 1893, 1 S.L.T. No. 51; *Reid*, July 20, 1897, 5 S.L.T. No. 158; *Dickson's Trustees*, June 5, 1894, 2 S.L.T. No 59. The Act of 1891 must be read as though forming part of that of 1867: that appeared from the first section, which bore that the Acts must be read and construed together. That being so, the tribunal appointed by the Act of 1867 for petitions of a similar character was a proper one for this petition.

Lord President—In the first petition Captain Campbell Johnston seeks to have his two brothers removed from the office of trustees under the trust-disposition and settlement of the late General Johnston, upon the ground that they have been continuously absent from the United Kingdom for more than six calender months, and that their absence incapacitates them from the due performance of the duties of the trust; and the Lord Ordinary has removed them upon this ground.

The respondents objected to the competency of the petition because it was presented to a Lord Ordinary instead of to one of the Divisions of the Inner House. It is true that it was formerly the practice to present petitions of a somewhat similar character to the Inner House, and that it is still competent to do so. But whether regard is paid to the terms of section 8 of the Trusts (Scotland) Amendment Act 1891, or to the practice which has followed upon it, I do not think that the presentation of such a petition to a Lord Ordinary is incompetent. Section 8 provided new grounds for the removal of trustees, and declared that in the case of a *mortis causa* trust the application for removal might be made "either to the Court of Session or to the Sheriff Court, from which the original confirmation of the trustees as executors issued." Now, the Outer House is as much a part of the Court of Session as the Inner House is, and the Act contains no direction as to which part of the Court the application is to be made. It would therefore seem to be competent to resort to any part of the Court to which it was the practice to present similar applications, unless exclusive jurisdiction in this matter was conferred on some particular part of the Court. Section 11 of the Trusts (Scotland) Act 1867 provides that the powers of the Court under it shall be exercised by the Lord Ordinary. Further, it appears that though not many years have passed since 1891 there has been, at all events, some practice to present such petitions as this in the Outer House, and the Lords Ordinary have sustained their jurisdiction to deal with them without their judgments having been brought under review of the Inner House —*vide Tod* v. *Marshall*, 23 R. 36; *Lees*, 1893, 1 S.L.T. No. 51; *Dickson's Trustees*, 1894, 2 S.L.T. No 59; *Reid Petitioner*, 1897, 5 S.L.T. No. 158, p. 124. It appears to me that where the Act is silent as to the part of the Court to be resorted to, it would require very slight practice approved by judicial sanction to warrant the presenting of such petitions to a Lord Oordinary, especially seeing that the Inner House has the power to review his judgment, as is being

done in this case. I may add that it does not appear from the Lord Ordinary's interlocutor that any objection was taken to his jurisdiction in the present case. I therefore consider that it would be a somewhat strained construction of section 8 to hold that the term Court of Session as there used is necessarily limited to one of the Divisions of the Inner House.

It was argued for the petitioner that section 1 of the Act of 1891 in providing that the prior Acts there mentioned and it (the Act of 1891) shall be read and construed together, in effect imported the provisions of section 26 of the Act of 1867 into the Act of 1891. I do not feel that it would be safe to go so far as that; but at the same time it appears to me that the fact of not very different powers being by the Act of 1867 confided to the Lord Ordinary aids the conclusion that the practice which has prevailed of presenting such application as the present in the Outer House is not erroneous.

The next question, assuming the petition to have been competently presented to the Lord Ordinary, is whether his Lordship's judgment on the merits is right. [His Lordship on the merits expressed the view that the Lord Ordinary was right, and further, that the petition for a judicial factor should be refused.]

LORD ADAM—I concur. I confess I had some difficulty as to the competence of this petition having been presented before the Lord Ordinary. That depends upon section 8 of the Act of 1891, under which such applications may be brought to the Court of Session or the Sheriff. I think the immemorial practice has been that all petitions which are not otherwise allocated —as, for example, under the Trust Act of 1867 and others—should be presented in the Inner House. My difficulty in this case is, that I do not find any provision in the statute except that they are to be lodged in the Court of Session; and that being so, whether the petition should not go to the ordinary jurisdiction of the Court relative to other proceedings of a similar kind. I will not enlarge upon this point, because I think the procedure before the Lord Ordinary in the first instance is a very advisable and very convenient procedure, and because, as I understand, the practice for eight or nine years of going to the Lord Ordinary with such petitions has been followed, and in such circumstances I am not of opinion that that should be disturbed. [His Lordship then stated the reason, why he was of opinion that the Lord Ordinary was right; and further, why the petition for a judicial factor should be refused.]

LORD KINNEAR—I agree with your Lordship both on the question of competence and on the merits.

LORD M'LAREN was absent.

The Court removed Augustine and Conway Campbell Johnstone from the office of trustee, and refused the petition for the appointment of a judicial factor.

Counsel for Petitioner—Dundas, Q.C.—Craigie. Agents—Mackenzie & Black, W.S.

Counsel for Respondents—H. Johnston, Q.C.—Clyde. Agents—Cowan & Dalmahoy, W.S.

Friday, January 26.

WHOLE COURT.

(Without the Lord President.)

THOMPSON'S TRUSTEES *v.* JAMIESON.

Succession—Vesting—Vesting subject to Defeasance—Bequest in Event of A Dying Childless to B and his Heirs or Assignees—Testator's Intention—Conditional Institution.

A testator by the fourth purpose of his trust-deed directed his trustees to invest in their names after twelve months from the date of his death £3500, and to make payment of the annual interest to A, his daughter, and in the event of her marrying and leaving children, to divide the capital among her children as soon after her death as possible, "and in the event of the said A dying without leaving lawful issue, I appoint my trustees to pay, make over, and denude of said sum of £3500 in favour of my said son B and his heirs or assignees." The testator further declared that in the event of A marrying a certain person the provision in favour of herself and her children was recalled, and the trustees were directed to pay, make over, and denude of the £3500 in favour of B and his heirs or assignees.

In another clause of the deed the testator referred to B as the party chiefly interested in the deed, and after the purposes of the trust were satisfied the trustees were directed to convey the land and residue of the estate to B "and his heirs and assignees." In order to facilitate the winding-up of the trust, the testator empowered his trustees, if they deemed it expedient, to take a security in their favour from B for the £3500 over the lands and others directed to be conveyed to him.

A survived the testator and married another than the person mentioned in the will. She died without issue. B survived the testator but died before A and left a settlement.

Held by a majority of the Whole Court, consisting of the Lord Justice-Clerk, Lord Young, Lord Trayner, Lord Moncreiff, Lord Kincairney, Lord Stormonth-Darling, and Lord Low, that the capital of the £3500 vested in B *a morte testatoris*, subject to defeasance in the event of A leaving issue—*diss.* Lord Adam, Lord Kinnear, and Lord Kyllachy, who were of opinion that the sum vested on the death of A in the heirs *in mobilibus* as at that date of B; and *diss.* Lord M'Laren and Lord