

On 5th November 1889 Mr Diack wrote to Mr Colquhoun, who apparently was the borrower's agent, desiring to have the bond paid, but as the notice was too late for the Martinmas term, Mr Colquhoun agreed to advance the money, and took a receipt for it, stating that the sum advanced was the amount due under the bond in question, and ending, "I oblige myself to sign discharge or assignation thereof when required." James Colquhoun never called on Mr and Mrs Diack to assign the bond, but his trustee now desires to enforce the obligation to assign, and he is met by the defence that the defenders' have a claim of larger amount against Colquhoun's estate, and that they are entitled to retain the value of the bond and disposition in security against the larger sum due by the estate to them.

To a right consideration of the case I think it is necessary to distinguish between the creditor's right in the security subjects and his right under the personal obligation or bond.

The debtor in the bond (David Young) is not proposing to pay up the loan. He is quite content that his property should remain impledged for £200, and when he comes to pay his debt he will no doubt demand a discharge of his deed (which by law is equivalent to a retrocession of the property) from that one of the parties before us who may be found to have right to the bond. He is therefore in no way interested in this question. But for the present a real right in security, or in popular language, a mortgage over Young's house in Vermont street, is vested in Mr and Mrs Diack, and is so vested by an *ex facie* absolute title, *videlicet*, an assignation of the security subjects. This real right in the defenders is no doubt qualified by Mr Diack's personal obligation to re-assign the subjects to Mr Colquhoun when required. Then the question is, whether the defenders are entitled to retain the security subjects until they are relieved of the subsequent advances which they made to Mr Colquhoun?

Suppose that the original transaction had been carried out by two deeds (according to a very ancient practice)—by a personal bond and a separate deed of conveyance of the lands in security of £200. This conveyance is, according to the supposition, in favour of Colquhoun, and is by him assigned to the Diacks. Then the question would be, whether the Diacks can be called upon to restore the property to Colquhoun's estate unconditionally while Colquhoun's estate stands indebted to them in a sum exceeding its value? In such a case I think the settled doctrine as to *ex facie* absolute titles applies, and the defenders' are entitled to retain the property against Colquhoun's trustee until relieved of their advances. But this is just the present case divested of the extraneous element of Young's personal obligation, for I cannot see that in a question with Colquhoun's trustee the existence of a collateral security in the shape of a personal bond makes any difference as to the rights arising out of the assignment of the subjects in security.

The defenders, of course, would be bound to assign the bond and security to Young on his offering to pay up the debt secured, but then I think they would be entitled to retain the sum of £200 received in exchange against Colquhoun's trustee under the same conditions on which they retain the security subjects against him.

I do not refer to the cases cited on the effect of *ex facie* absolute titles, because the law is not in dispute. The question is one as to the application of the rule of law to the facts of the case, and I do not think that the authorities throw any light on this point. In my opinion the Lord Ordinary's judgment is right, and the reclaiming-note ought to be refused.

LORD PRESIDENT and LORD ADAM concurred.

LORD KINNEAR was absent.

The Court adhered.

Counsel for the Pursuer and Reclaimer—Ure, K.C.—Clyde, K.C.—Craigie. Agents—Webster, Will & Co., S.S.C.

Counsel for the Defenders and Respondents—H. Johnston, K.C.—Younger. Agents—Macpherson & Mackay, S.S.C.

Thursday, December 12.

FIRST DIVISION.

[Sheriff of the Lothians.

OLIVER v. WILKIE.

Expenses—Decree in Name of Agent-Disburser—Cognate Actions—Party Successful in One Action but not in the Other—Compensation.

A having been found liable to B in the expenses of an action of affiliation and aliment raised against him by B, objected to the decree going out in the name of the agent-disburser, on the ground that he had been successful and had been found entitled to expenses to a greater amount against B in an action of damages for seduction at her instance against him arising out of the same circumstances.

Held that the agent-disburser was not entitled to decree, but that the expenses in the one action must be set against those in the other.

Jane Oliver raised an action of damages for seduction against George Wilkie, law apprentice, which was tried before Lord Stormonth Darling and a jury. In this action the defender obtained a verdict in his favour. He was accordingly assoilzied and was found entitled to expenses. While this case was pending the pursuer gave birth to a child. Thereafter she raised an action of filiation and aliment against Wilkie in the Sheriff Court at Edinburgh. In this action she was successful in the Sheriff Court. On appeal to the Court of Session the judgment in her favour was

affirmed, and she was found entitled to expenses. The accounts of expenses in both actions were remitted to the Auditor for taxation, and the amounts of the accounts as taxed were respectively £70, 4s. 8d., the amount of the pursuer's account in the filiation action, and £187, 6s. 2d., the amount of the defender's account in the action for seduction. The case having come before the Court for approval of the Auditor's reports, counsel for the pursuer moved for decree for the amount of her expenses as taxed in the filiation action in name of the agent-disburser.

The defender objected, and argued—The proper course here was to give him decree for his expenses in the case in which he had been successful, less the expenses found due by him in the case in which he had been unsuccessful—*Graham v. M'Arthur*, November 28, 1826, 5 S. 46; *Gordon v. Davidson*, June 13, 1865, 3 Macph. 938; *Craig v. Craig*, June 1, 1852, 14 D. 829; *Portobello Pier Co. v. Clift*, March 16, 1877, 4 R. 635, 14 S.L.R. 435. As neither decree had been extracted both actions were still pending and the Court had control over the matter—*Paolo v. Parias*, July 3, 1897, 24 R. 1030, 34 S.L.R. 780. No distinction could be drawn as to the subject-matter of the two actions, for it was so much the same that the two actions might have been conjoined—*Trotter v. Happer*, November 24, 1888, 16 R. 141, 26 S.L.R. 79.

Argued for the pursuer—The two actions here were different in legal quality. The one was founded on delict, the other on a debt *ex debito naturali*. The authorities favoured the decree in name of the agent-disburser now asked for—*Strain v. Strain*, March 7, 1890, 17 R. 566, 27 S.L.R. 586; the *Portobello Pier Case* (*supra*) was quite different, for there the subject-matter of the two actions was exactly the same.

LORD PRESIDENT—It so happens that there are here two actions—one an action of damages for seduction at the instance of the pursuer, and the other an action, also at her instance, for aliment for the child which was the fruit of the intercourse founded on as giving rise to the claim of damages for seduction. It is not disputed that both these claims might have been maintained in the same action, but the pursuer chose to bring an action of damages for seduction before the birth of the child, which, however, was then *in utero*. If the two claims had been made in the same action, and the pursuer had failed in the claim for damages for seduction but succeeded in the action of aliment, the Court might possibly have given no expenses to either party, there having been divided success. The pursuer has failed in one and has succeeded in the other of the two actions which she brought, the decree for expenses has not been extracted in either case, and both actions are still before the Court. It might possibly have been different if extract had been obtained, but I suppose that if a motion had been made for extract it might have been resisted on the ground that extract should be superseded until the other action

was decided. It seems to me that the right of an agent-disburser, which is derived from the client, cannot be pressed so as to do injustice to the other party by preventing the one claim for expenses being set off against the other. It would be a strong thing to allow an agent-disburser, in aid of his derivative right, to intervene and prevent justice being done between the principal parties. I therefore think we should not sustain the claim of the agent-disburser, but that we should give decree for the defender's expenses in the action of seduction under deduction of the pursuer's expenses in the action for aliment.

LORD M'LAREN—I am of the same opinion, and only add that I wish to reserve my judgment as to whether the right to set off unextracted decrees for expenses is not a universal right where the cases are between the same parties. On this question I cannot attach much weight to the view of the Court in the *Esk Pollution* cases in regard to the conjunction of actions against different defenders, for where the defenders are different a decree for expenses against one defender could not possibly be set off against a decree for expenses in favour of a different defender. The question only arises where the parties to the two actions are the same. Now, it is quite settled that where mutual claims are the subject of different actions, the Court may supersede extract of the principal decree under one action until decree shall be pronounced in the other in order that the right of compensation may not be defeated, and it seems to me that extract of a decree for expenses could be superseded in the same way and for the same purpose as a principal decree.

In that case, and also in the case where, as here, the parties have chosen to leave the decrees for expenses unextracted, I should wish to keep open the question whether compensation ought not to be allowed irrespective of the nature of the two actions. I only say this that I may not be supposed to limit my opinion to cases where the actions are of a cognate character. In such cases I agree that it is in accordance with the best authority to allow compensation for the sums decerned for as expenses of process.

LORD KINNEAR—I agree for the reasons stated by your Lordship in the chair, and I also assent to what Lord M'Laren has said, that the question as to the conjoining of a number of different defenders in one action belongs to a different chapter of law from that which we are now considering.

LORD ADAM concurred.

The Court pronounced these interlocutors—

Action for Seduction.

“*Edinburgh, 12th December 1901.*—The Lords having heard counsel for the parties, Approve of the Auditor's report on the defender's account of expenses, and decern against the pursuer for payment to the defender of the sum of £187, 6s. 2d. sterling, being the taxed

amount thereof, but that under deduction of the sum of £70, 4s. 8d. sterling, being the taxed amount of the expenses found due by interlocutor of this date to the pursuer in the action of affiliation raised by her against the defender."

Action of Affiliation.

"*Edinburgh, 12th December 1901.*—The Lords having heard counsel for the parties on the motion of the pursuer for approval of the Auditor's report on her account of expenses, and for authority to allow decree therefor to go out and be extracted in her agent's name as disburser thereof, Approve of the said report: Find that the taxed amount thereof is £70, 4s. 8d. sterling, but find that the pursuer is not entitled to obtain decree therefor in her agent's name as aforesaid in respect that the defender is entitled to set off the expenses taxed at £187, 6s. 2d. found due to him in the action of damages for seduction raised by the pursuer against him in this Court, and for which sum of £187, 6s. 2d. under deduction of the sum of £70, 4s. 8d. foresaid, decree has been given in favour of the defender in the said action of damages by interlocutor of this date."

Counsel for the Pursuer—A. Moncreiff.
Agent—J. W. Deas, S.S.C.

Counsel for the Defender—Wilton.
Agent—Robert Macdougald, S.S.C.

Friday, December 13.

SECOND DIVISION.

INGLIS'S TRUSTEES *v.* INGLIS.

Writ—Authentication—Informality—Petition to Establish Execution of Informally Executed Will—Conveyancing (Scotland) Act 1874 (37 and 38 Vict. cap. 94), sec. 39.

On A's death a document in the form of a trust-disposition and settlement was found in his safe among other documents of value. This document was not holograph. It was written on two separate sheets of paper and extended to eight pages. It was signed on the last page only by A and by two persons who signed as witnesses. There was no testing clause, and the designations of the witnesses and the date of the deed were not stated. On the backing appeared the letters "Dft." In the body of the writing were a few clerical corrections made by the writer. The document was written continuously with the proper catchwords at the foot of each page. The deceased left no other will.

In an application presented for the purpose of proving the execution of the deed in terms of section 39 of the Conveyancing Act 1874, it was proved that the deed had been prepared as a draft by A's lawyers on his instruc-

tions, and written out by one of their clerks, and that it had been sent by them to him in November 1893; that it was never returned to them, and that sometime between January 1898 and May 1900 it was brought by A to his bank, where he occasionally took documents for signature, and there was signed by him before the two witnesses.

Held that the petitioners had sufficiently established the execution of the writing in question as the final trust-disposition and settlement of the deceased in terms of the statute.

By section 39 of the Conveyancing (Scotland) Act 1874 it is enacted, "No deed-instrument, or writing subscribed by the granter or maker thereof, and bearing to be attested by two witnesses subscribing, and whether relating to land or not, shall be deemed invalid or denied effect according to its legal import because of any informality of execution, but the burden of proving that such deed, instrument, or writing so attested was subscribed by the granter or maker thereof, and by the witnesses by whom such deed, instrument, or writing bears to be attested shall lie upon the party using or upholding the same, and such proof may be led in any action or proceeding in which such deed, instrument, or writing is founded on or objected to, or in a special application to the Court of Session, or to the sheriff within whose jurisdiction the defender in any such application resides, to have it declared that such deed, instrument, or writing was subscribed by such granter or maker and witnesses."

Robert Inglis, feuar, Greenock, died at Greenock on 29th September 1901. He left no issue, and was survived by his widow Mrs Elizabeth Bain Swan or Inglis, and by two brothers, George Inglis senior, Exeter, and Thomas Stewart Inglis senior, commercial traveller, London, and by the following children of his deceased brother James Inglis, namely, George Inglis junior, locomotive painter, Glasgow, Peter Inglis, house painter, Glasgow, and Mary Ann Inglis. He was predeceased by his father and mother.

After the death of Robert Inglis his repositories were searched, and there was found in an iron safe in his bedroom (1) a pocket-book containing securities and a copy of the deceased's antenuptial marriage-contract; (2) an envelope containing the titles of his house; (3) an envelope containing Turkish bonds; (4) an envelope containing Singer's debentures; (5) an envelope containing a document in the form of a trust-disposition and settlement.

The document, No. 5 of those mentioned, was written upon two separate sheets of paper and extended to eight pages. It was not written by the testator, and bore a signature on the last page only. At the foot of each page was the proper catchword connecting it with the next page. On the backing of the deed appeared the letters "Dft." By this deed the testator assigned and disposed of his whole estate, heritable and moveable, to his wife Mrs Elizabeth Bain Swan or Inglis, his brother Thomas