are imposed, and other matters under the Acts relating to duties of excise and excise licences, and all enactments relating to those duties and to punishments and penalties in connection therewith shall apply accordingly."

The complainer contends that the effect of this provision is to vest in the county council the sole right to prosecute for punishments and penalties under the Act, and that accordingly the instance of the Procurator-Fiscal is by plain implication excluded. I am unable to accept this view. The provision, as it appears to me, places the county council as regards prosecution in the place of the Revenue authorities, whose right of prosecution is limited to revenue cases. Under the Roads Act with which we are dealing offences are created which have no relation to the collection of revenue, and I am unable to entertain the suggestion that an exclusive title to prosecute for such offences has been conferred upon the county council *qua* Revenue collectors.

I shall assume, however, that the effect of this provision is to confer upon the county council a privative right to prosecute for the recovery of penalties or additional duties in respect of failure in payment of the duties prescribed. I say I assume it, because affirmance of it would involve an examination of different Revenue statutes to which our attention was not directed in argument. But this assumption being made, the question arises whether the penalty here said to have been incurred was a penalty for failure to pay a duty imposed by the statute.

I am of opinion that it was not. So far as appears in the present case the duty had been duly paid. The offence was failure to exhibit in a conspicuous place on the car, in the manner prescribed by statute and regulation, the Revenue licence issued for the car. I recognise that one of the objects of this requirement may have been to facilitate the collection of the duty. But the Legislature may have had other objects in view. I am unable to regard the penalty incurred as a penalty or additional duty for failure in payment of a duty imposed by statute, and in my view any privative right the county council may have to prosecute *qua* Revenue collector does not extend to such a contravention. Accordingly I reach the result that the instance of the Procurator-Fiscal as such is not excluded and was here sufficient.

In regard to the two other cases I agree with your Lordship in the chair.

The Court refused the bills of suspension in the first and third cases, and in the second case passed the bill and suspended the sentence.

Counsel for the Complainers—Maclaren, K.C.—Garson. Agents—Balfour & Manson, S.S.C.

Counsel for the Respondent — Fenton, K.C., A.-D.—Lord Kinross, A.-D. Agent —John Prosser, W.S., Crown Agent.

COURT OF SESSION.

Friday, December 7.

SECOND DIVISION.

EDINBURGH PARISH COUNCIL *v.* COUPER.

Parent and Child — Aliment—Liability of Parent's Estate for Aliment of Lunatic Daughter — Claim by Parish Council — Right of Executor to Distribute Estate.

An executor divided the estate of his father, who died intestate, equally between himself and his sister, who was a pauper in a lunatic asylum, appropriating to himself his own share and placing the share falling to his sister in bank on deposit-receipt. The parish council, to whom the *incapax* was chargeable, objected to the distribution of the estate on the ground that it ought to have been retained intact in order to meet their claims for her future aliment. *Held* that the executor was not bound to retain the estate intact so as to provide security for the contingency of a claim for aliment emerging, and that in the circumstances he was entitled to distribute it.

Hugh Kinghorn Couper, Marine Road, Dunbar, died on 16th January 1922 intestate. He was predeceased by his wife and survived by one son and a daughter, the latter having for some time been a pauper lunatic and chargeable as such to the Edinburgh Parish Council. Questions having arisen in regard to the obligation to maintain the lunatic daughter and the disposal of the deceased's estate a Special Case was presented. To it the parties were (1) the Edinburgh Parish Council, *first parties*, (2) Matthew Anderson Couper, *second party*.

The Case set forth—"1. Hugh Kinghorn Couper, music teacher, who resided in Marine Road, Dunbar, died on 16th January 1922 intestate and domiciled in Scotland. He was predeceased by his wife, and was survived by one son Matthew Anderson Couper, and one daughter Mrs Jessie Anderson Couper or Simpson, widow of Allan Boak Simpson, who died in Leith on 30th January 1909. The said Matthew Anderson Couper was appointed executor-dative *qua* next-of-kin of the said Hugh Kinghorn Couper, and as such and as an individual is the party of the second part. 2. . . . The said Mrs Jessie Anderson Couper or Simpson has been a pauper lunatic since 16th January 1913, and is at present chargeable as such to the said Edinburgh Parish Council, who are the parties of the first part. She is forty-two years of age. 3. The said Mrs Jessie Anderson Couper or Simpson was until the death of her father, the said Hugh Kinghorn Couper, possessed of no means of her own, and the said Hugh Kinghorn Couper was under legal liability to aliment and support her from the date when she became chargeable as a pauper lunatic as aforesaid. After she became chargeable a claim was intimated on behalf

of the Parish Council to the said Hugh Kinghorn Couper for repayment of her board in the said asylum, but in respect that the said Hugh Kinghorn Couper undertook the maintenance and support of the said Mrs Jessie Anderson Couper or Simpson's two pupil children, Margaret Simpson who was born on 22nd January 1906, and Allan Hugh Simpson who was born on 8th February 1907, the said claim was not insisted in. The said two children were maintained by the said Hugh Kinghorn Couper until the date of his death. 4. The estate, which was wholly moveable, left by the said Hugh Kinghorn Couper, after payment of ordinary creditors, deathbed and funeral expenses, and the expenses of the executry, amounted to the sum of £280, 19s. 2d. The said Mrs Jessie Anderson Couper or Simpson and the said Matthew Anderson Couper are the sole next-of-kin and heirs *in mobilibus ab intestato* of the said Hugh Kinghorn Couper. 5. The second party duly entered upon the office of executor-dative of the said Hugh Kinghorn Couper, and he has prepared a scheme of division of the said balance of the moveable estate of the said Hugh Kinghorn Couper amounting as aforesaid to the sum of £280, 19s. 2d. between himself and the said Mrs Jessie Anderson Couper or Simpson as heirs *in mobilibus* of the said Hugh Kinghorn Couper. Under the said scheme of division the said estate is apportioned equally between the second party as an individual and the said Mrs Jessie Anderson Couper or Simpson to the extent of £140, 9s. 7d. each. On 22nd June 1922 the second party placed the sum of £140, 9s. 7d., the amount of the share apportioned to the said Mrs Jessie Anderson Couper or Simpson as aforesaid, in bank on deposit-receipt and appropriated to himself the sum of £102, 5s. 11d., the balance of the share of the estate falling to himself under the said scheme of division, less sums amounting in all to £38, 4s. 8d, paid to the second party out of the executry estate on 5th and 20th May and 5th June 1922. The said last-mentioned payments to the second party and the final division of the estate were made by the second party less than six months after the date of the death of the said Hugh Kinghorn Couper, and in the knowledge of the fact that the said Mrs Jessie Anderson Couper or Simpson was being maintained at the public expense as a pauper lunatic. 6. The amount expended by the first parties or their predecessors, the Parish Council of Leith, on behalf of the said Mrs Jessie Anderson Couper or Simpson from 16th January 1913 until the death of the said Hugh Kinghorn Couper on 16th January 1922 was £303, 6s. 6d. For the period from 16th January 1922 until Martinmas 1922 the first parties have expended further sums on the maintenance of the said Mrs Jessie Anderson Couper or Simpson amounting approximately to £48."

The *questions of law* for the opinion and judgment of the Court included, *inter alia*, the following—"4. Was the second party entitled to distribute the estate as he did according to the said scheme of division?"

Argued for the first parties—The circumstances did not permit the executor to distribute the estate. The first parties were entitled to disregard the share falling to the pauper lunatic daughter, and stipulate that prior to any distribution taking place due provision fell to be made for her. A claim for aliment by a child was a claim which transmitted against his father's representatives, and was a debt chargeable upon his whole free estate, Before the executor could divide the estate provision had accordingly to be made by him for paying off this debt. Counsel referred to the following authorities—Bankton's Inst. i, 6, 16; Erskine's Inst. i, 6, 58, and note; Stair's Inst. i, 5, 7; More's Notes to Stair, xxx; *Thomson*, 1788, M. 434; *Young*, 1790, M. 400; *Scot*, 1759, M. 440; Riddel's, 1802, M. App. "Aliment," No. 4; *Ormiston* v. *Wood*, 1838, 11 Sc. J. 232; *Spalding* v. *Spalding's Trustees*, 1874, 2 R. 237, 12 S.L.R. 169; *Parish Council of Leslie* v. *Gibson's Trustees*, 1899, 1 F. 601, 36 S.L.R. 426; *Davidson's Trustees* v. *Davidson*, 1907 S.C. 16, 44 S.L.R. 23; *Anderson* v. *Grant*, 1899, 1 F. 484, 36 S.L.R. 369; *Urquhart's Executors* v. *Abbott*, 1899, 1 F. 1149, 36 S.L.R. 896; *Howard's Executor* v. *Howard's Curator Bonis*, 1894, 21 R. 787, 31 S.L.R. 661. The case of *Stuart* v. *Court*, 1848, 10 D. 1275, fell to be distinguished from the present one.

Argued for the second party—The insane child's legal share of the estate was not yet exhausted, and accordingly there was as yet no outstanding obligation to fulfil. The second party as executor was entitled to distribute to the children their legal share of their parent's estate. The obligation of the deceased to aliment his daughter did not transmit to his representatives after his death. Counsel cited the following cases—*Stuart* v. *Court* (*cit.*) and *Mackintosh* v. *Taylor*, 1868, 7 Macph. 67, 6 S.L.R. 68.

LORD HUNTER—The first parties to this Special Case are the Parish Council of the City of Edinburgh, and the second party is Matthew Anderson Cowper as executor-dative *qua* next-of-kin of the late Hugh Kinghorn Cowper and as an individual. From the Stated Case it appears that the late Mr Cowper, who was a music teacher, died on 16th January 1922 intestate and domiciled in Scotland. He was predeceased by his wife and survived by one son, the second party, and by a widowed daughter Mrs Simpson. Mrs Simpson is a lunatic; she has been confined in an asylum since the year 1913, and so far as appears from the case there is no immediate prospect of her recovering her sanity. She is forty-two years of age. The estate left by the deceased amounted to the sum of £280 19s. 2d. On the 22nd June 1922 the second party divided that estate equally between himself and his sister, placing £140, 9s. 7d. on deposit-receipt in the name of or for the benefit of his sister, and crediting himself with £102, being the balance left after deducting some £40 which he had already received, from £140, 9s. 7d.

The contention of the Parish Council is that he had no right to distribute the estate, that he ought to have retained it

intact in order to meet their claim for future aliment in respect of Mrs Simpson, who was being maintained by them in an asylum. They make no claim against the second party in respect of any aliment that they paid during the lifetime of the deceased Mr Cowper. Their claim deals entirely with the future.

I sympathise with the laudable desire of the Parish Council to save the ratepayers expense, but at the same time I think the contention put forward by them in this case is of a startling character. If given effect to it would or might have both anomalous and disastrous results. But so far as I am personally concerned—and I am dealing with the question as to whether the second party was entitled to distribute the estate as the really practical question in this case—I am satisfied that that question is clearly decided against the contention of the Parish Council by previous decisions. I refer, in particular, to the case of *Mackintosh* v. *Taylor*, 7 Macph. 67, and the later case of *Howard's Executor* v. *Howard*, 21 R. 787. In the case of *Mackintosh* the rubric is in general terms—"*Held* . . . that a father's natural obligation to support his lunatic son ceases at his death, and that his executor is not bound to set apart executry funds for that purpose beyond the legal share falling to the son at his father's death." Criticism was made of the accuracy of that rubric, and it may be that it is open to criticism, because there are certain senses in which such an obligation as the obligation of a father to support an indigent child does transmit against his undistributed estate. It may even be that it transmits against his representatives. But the important point is that *Mackintosh's* case, so far as I see, affords a complete justification for the distribution of the estate of a deceased father among the children having legal claims to it without the necessity of holding it up in consequence of some future or contingent claim. In giving judgment in that case Lord Ormidale said (at p. 68)—"The claim of the advocator in this case is of a very peculiar, and so far as I am aware, unprecedented character. It is made by the inspector of poor for the parish of Brechin, against the respondent, for the maintenance in an asylum of his lunatic brother; and the ground on which the respondent is sought to be made responsible is that his and the lunatic's father was under an obligation to have provided for the support of his lunatic son, and that the respondent having succeeded to part of his father's inheritance is to that extent liable *jure representationis* in the present claim." Lord Mure says (at p. 70)—"I find no authority for holding that in such a case"—that is, the case where one member of the family was a lunatic, and in fact was at the date of the death of the parent being maintained in a lunatic asylum—"the whole estate is, if necessary, to be applied in support of the brother chargeable to the parochial board, even at the risk of reducing the rest of the family to poverty." In the case of *Howard* the widow was the lunatic. She had got her rights in the estate, but in addition it was claimed on her behalf by her *curator bonis* that the whole estate should be held up in order to meet possible claims. No doubt there was an alternative claim, and the Vice-Dean has suggested that this case is not a decision on the point in question. With that view I do not agree. I think the point in this present case was precisely raised in the case of *Howard*, and the decision is a complete authority against his contention. In giving judgment in that case Lord M'Laren said (at p. 789)—"No authority has been cited for the proposed extension of the doctrine of the liability of the deceased's estate for aliment, and such extension might lead to very inequitable results, for the claim, if it exists at all, must continue through life, and it would be in the power, for example, of a child who had spent his share of the succession to come down at any time upon his more provident brothers and sisters for aliment."

That case was explained in the subsequent case of *Anderson* v. *Grant*, 1 F. 484. There the Court gave an additional allowance to a widow who was not in receipt of a sufficient competence from her husband's estate though she had received her conventional provisions. The important point of *Anderson's* case, so far as the present case is concerned, is that the Lord President explains the decision in *Howard's* case and explains it to my mind in a way which makes it a complete authority against the contention of the Parish Council. His Lordship said (at p. 486)—"The reclaimer's point is that the Court cannot decern for aliment to a widow out of the capital of her husband's estate. This, I think, is unsound in law. The claim, if it exists, is that of a creditor, and to a creditor there is no distinction between the capital and income of the debtor's estate. The case of *Howard's Executor* does not support the reclaimer's contention. In that case, so far as the controverted fund was concerned, there was no existing claim of debt. There was merely an apprehension that in the future a claim might arise, and the proposal of the widow was that the whole of the estate should be retained to meet that contingency." Lord Kinnear said (at p. 487)—"The case of *Howard's Executor* presents no difficulty as it has been explained by your Lordship who took part in the judgment, because all that it appears to decide is that the widow's claim for aliment, although a personal claim against the husband's representatives, does not constitute a charge on the estate so as to create a burden over it enabling her to prevent the distribution of the estate among the beneficiaries in order to provide security for the contingency of her claim for aliment emerging."

On those authorities the contention of the Parish Council as to the want of power on the part of the second party to distribute the estate as he has done is unsound. I think it would be unfortunate in the case of small estates if any such view as the Parish Council in the present case puts forward were to be given effect to. That really is the practical question in the case, because

if we determine the fourth question adversely to the Parish Council it seems to me quite unnecessary for us to deal with the three other questions.

No doubt in certain cases—we have had a number of examples cited to us—the representatives of a deceased parent have been held liable to aliment either a widow or some other member of the family. These have invariably been cases where the person upon whom the obligation has been placed has been specially favoured, *i.e.*, has obtained a larger share of the estate than he would have obtained if the legal order of succession had applied, or if there has been a legal distribution of the estate, where the result has been to give practically everything to one and almost nothing to the other members of the family, as, for example, where a man dies leaving only heritage and everything passes to the heir. The other members of the family, if there are any, have to be alimented by the heir who has taken the whole patrimony of the father. There are other similar cases.

In the present case I do not think it is necessary for us to consider whether a claim could be made good against the second party if the fund that properly effeirs to the lunatic were exhausted. I do not say anything to encourage the Parish Council to make such a claim, because as at present advised I incline to the opinion that such a claim would be doomed to failure. I suggest to your Lordships that we should answer the fourth question in the affirmative and find it unnecessary to answer the other questions.

LORD ORMIDALE—I agree entirely with the opinion of Lord Hunter. I think in this case it is unnecessary to deal with the first three questions.

As to question 4, in the special circumstances disclosed and admitted in this case, which are somewhat peculiar, there can be no doubt as to the answer to be given. The question is really foreclosed by authority. I thought at first that the Vice-Dean's criticism of the case of *Howard* might make it possible to distinguish that case so far as its law is concerned from the present. But it is impossible, in my judgment, when one considers the opinions in the subsequent case of *Anderson* v. *Grant*, in which the result of the decision in *Howard* is stated both by the Lord President and Lord Kinnear, to doubt that the situation here and in *Howard* is in effect the same.

Accordingly I agree that the second party having distributed the estate as he did in June 1922, the fourth question should be answered in the affirmative.

LORD ANDERSON—I agree. The contention of the first parties is that the whole estate of the deceased should have been retained in the hands of the executor to meet claims which may possibly be made in connection with the support of a daughter of the deceased. If this contention were given effect to, I think it is plain that the estates which would be affected would be small estates, because in the case of large estates the legal share would be sufficient to meet the cost of the future maintenance of the *incapax*. In the case of small estates there may be others interested to whom indefinite impounding of the estate would be a serious hardship.

If the case is looked at apart from decision, it seems to me that there are certain considerations of principle and of equity which are adverse to the argument of the first parties. In many cases estates would never be distributed at all, and this would happen because the whole estate would be expended on behalf of the *incapax*, with the result that other children, and it may be the widow, would be deprived of their legal rights. Of course this result would follow if it were a claim of aliment, because these claims for legal rights are postponed to the claims of creditors which are due and prestable. But it seems to me that this is not a real or true debt at all. It is a mere contingent liability which may never emerge or become prestable. The particular circumstances of this case point that observation, because on 22nd June 1922, when the executor divided the estate, it appears that only £28 or thereby was due to the Parish Council for past maintenance of the *incapax*, and there was therefore at that date the sum of £112 or thereby which was available for her future maintenance. But before that considerable sum had been expended the unfortunate woman might have died or she might have recovered. Therefore it seems to me that in the particular circumstances of this case, keeping these possible contingencies in view, the executor was well justified in dividing the estate at the time he did. I am of opinion that there is no duty on an executor to make provision for a claim of this nature before distributing. It is enough if he pays or sets aside the legal share of the *incapax*, which, of course, is liable for her future support. There has been no authority referred to to substantiate the proposition that a claim of so hypothetical a character must be provided for before the legitim fund is calculated. So much for principle and equity, which I think are against the first parties.

As regards authority, I am of opinion that the cases referred to by Lord Hunter, and especially the cases of *Mackintosh*, *Howard*, *Anderson*, and *Davidson's Trustees* (1907 S.C. 16), are authorities direct and pertinent against the contentions of the first parties. I therefore agree that the case should be disposed of in the manner suggested by Lord Hunter.

LORD JUSTICE-CLERK (ALNESS)—I agree. I think the contention of the first parties is concluded against them by authority, and in particular by the case of *Howard's Executor*. I should have thought on a perusal of that case that it was decisive of the controversy between the parties, and I am fortified and justified in that view by what passed in the subsequent case of *Anderson* v. *Grant*. To hold that the case of *Howard* was not decisive against the contention of the first parties would involve the assumption that both the Lord President and Lord Kinnear, who gave judgment in the case of

Anderson, and the former of whom had taken part in the judgment in the case of *Howard*, had misapprehended the tenor of that judgment. That is an assumption which I am not prepared to make.

The Court answered the fourth question of law in the affirmative.

Counsel for the First Parties—Brown, K.C.—Burnet. Agents—R. Addison Smith & Company, W.S.

Counsel for the Second Party—Gentles, K.C. — Duffes. Agents — Mackenzie & Wyllie, W.S.

Saturday, December 15.

FIRST DIVISION.

[Lord Blackburn, Ordinary.

RAE *v.* STRATHERN.

Reparation—Illegal Apprehension—Action against Procurator-Fiscal—Alleged Excess of Jurisdiction—Relevancy—Malice—Want of Probable Cause—Summary Jurisdiction (Scotland) Act 1908 (8 *Edw. VII, cap.* 65), *sec* 59.

Sheriff—Jurisdiction—Statutory Offence—Neglect of Child—Accused Resident outwith Sheriffdom—Alleged Locus delicti within Sheriffdom—Children Act 1908 (8 *Edw. VII, cap.* 67), *sec.* 12—*Summary Jurisdiction (Scotland) Act* 1908 (8 *Edw. VII, cap.* 65).

A father who resided outside the jurisdiction of the Sheriff Court of Lanark was apprehended and detained in prison for twelve days at the instance of the Procurator-Fiscal of the Lower Ward of that county on a complaint under the Summary Jurisdiction (Scotland) Act 1908, charging him with wilfully neglecting to provide for his child at an address in Glasgow, contrary to section 12 of the Children Act 1908. The Sheriff after hearing evidence found the accused "not guilty." Thereafter the accused brought an action of damages against the procurator-fiscal, averring that the apprehension was illegal and the prosecution wrongful, malicious, and without probable cause in respect (1) that he (pursuer) was not subject to the jurisdiction of the Sheriff of Lanark, (2) that he had been apprehended and detained when a warrant of citation would have ensured his presence at the trial, and (3) that if defender had made proper inquiries before bringing the prosecution he would have discovered that the child was then in the custody of pursuer's wife and was well cared for. *Held* (1) that as the alleged *locus delicti* mentioned in the complaint was within the jurisdiction of the Sheriff the warrant of apprehension was legal, and, accordingly, that the proceedings had been competently taken under the Summary Jurisdiction (Scotland) Act 1908; and (2) that as the pursuer had not relevantly averred malice and want of probable cause, as required by section 59 of that Act, the defender was entitled to the protection conferred by the section, and action *dismissed.*

Opinions reserved as to the meaning and effect of the condition in section 59 of the Summary Jurisdiction (Scotland) Act 1908 that the proceeding complained of shall have been "quashed," and also as to whether the pursuer had suffered "imprisonment" in the sense of the section.

The Summary Jurisdiction (Scotland) Act 1908, sec. 59, enacts—"No judge, clerk of court, or prosecutor in the public interest shall be liable to pay, or be found liable by any court in damages for or in respect of any proceeding taken, act done, or judgment, decree, or sentence pronounced under this Act, unless the person suing has suffered imprisonment in consequence thereof, and such proceeding, act, judgment, decree, or sentence has been quashed, and unless the person suing shall specifically aver and prove that such proceeding, act, judgment, decree, or sentence was taken, done, or pronounced maliciously and without probable cause. . . ."

On 17th August 1922 William Rae, wire worker, 36 Market Street, Musselburgh, brought an action against John Drummond Strathern, Procurator-Fiscal for the Lower Ward of the County of Lanark, in which he concluded for £500 damages in respect of alleged illegal apprehension and malicious prosecution.

The pursuer's averments were as follows:—"(Cond. 2) The pursuer was married to his wife in Musselburgh on 8th April 1921, and there is one child of the marriage, viz., George Rae, who was born on 25th September 1921. The pursuer's wife deserted him on 25th February 1922, having gone to live with her parents at 8 Bellfield Street, Glasgow. When she went to Glasgow as aforesaid she took with her the child of the marriage. On several occasions pursuer endeavoured to induce his wife to return to him but she refused to do so. On his wife declining to return and live with the pursuer he did his utmost to obtain possession of his child, but his wife refused to deliver it to him. (Cond. 3) On 19th June 1922 defender presented in the Sheriff Court of Lanarkshire at Glasgow a complaint under which pursuer was charged at the instance of the defender 'that being the father, and having the custody or care of your child George Rae, age eight months, you did between 25th February 1922 and 17th June 1922, at 8 Bellfield Street, Glasgow, wilfully ill-treat and neglect him in a manner likely to cause him unnecessary suffering or injury to his health by failing to provide him with adequate food, clothing, bedding, and lodging, contrary to the Children Act 1908, section 12.' (Cond. 4) On the above-mentioned complaint the defender applied for a warrant to arrest the pursuer, and on 20th June 1922 Sheriff-Substitute Thomson on the defender's application granted a warrant for the apprehension of the pursuer, and on this warrant the pursuer was apprehended