been obliged to pronounce a judgment which would have given such facility to the stirring up and the revival of disputes between the different dissenting religious persuasions into which Scotland is unhappily divided, and I feel great satisfaction in being able, according to the well established principles of Scottish law, to advise your Lordships, that this appeal be dismissed with costs. I ought to mention, that my noble and learned friend LORD WENSLEYDALE, who heard this case, dissents from the judgment that I have proposed to your Lordships.

LORD KINGSDOWN.—My Lords, having had an opportunity of hearing and considering the opinion which has just been expressed by my noble and learned friend on the woolsack, it is unnecessary for me to say more than that I concur both in the conclusion at which he has arrived, and in the principles upon which that conclusion is founded. The question is not what would be the result, if the information had been filed in this country by the Attorney General, or if a similar proceeding had been taken by the Lord Advocate in Scotland, if he had such a power (I do not know whether he has or not). I regard this as simply a suit instituted by these parties in respect of their own individual interests; and, in respect of those interests, I think that they are precluded by their own conduct from maintaining this action.

*Interlocutors affirmed, and appeal dismissed with costs.*

*For Appellants*, Deans and Rogers, Solicitors, London; James Finlay, S.S.C., Edinburgh.—*For Respondents*, Dodds and Greig, Solicitors, London; Auld & Chalmers, W.S., Edinburgh.

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FEBRUARY 11, 1861.

## JOHN DUMBRECK and Others, *Appellants*, *v.* The Rev. W. STEVENSON and Others (Stevenson's Trustees), *Respondents.*

Trust—Minor—Pupil—Parent and Child—Right of Administration—Payment of Child's Legacy—Process—6 Geo. IV. c. 120, § 10—Act of Sederunt 11th July 1828, § 47. *The trustees under a trust disposition paid the shares of two sons to their father, as their administrator, at the same time taking caution from him, and they also received a full discharge, by the eldest son, and the father, as his curator, and by the father, as tutor to the younger son. The sons, on arriving at majority, objected, in a multiplepoinding, to the trustees crediting themselves with these payments, averring that the father had appropriated the money to his own uses, and the cautioner had become bankrupt; and on these statements they close their record.*

HELD (affirming judgment), *That the payment of the sons' shares by the trustees to the father, who, though poor, was not bankrupt, was, in the circumstances,* in bonâ fide, *and a valid and competent act, in respect the trust deed did not exclude the father's tutorial and curatorial right of administration over the estate of the minors.*

*Leave to make additional statements to the record, in an action of multiplepoinding, long after it had been closed,* refused *as incompetent, in respect the proposed statements contained new grounds of action.*[1]

The objectors appealed to the House of Lords, maintaining in their case, that the judgment of the Court of Session should be reversed. 1. Because, by the terms of the trust settlement, the power of administration of the appellant's father was excluded, and the respondents were not justified in making payment to him of the provision bequeathed to the appellant.—Williams on Executors, vol. ii. pp. 1267-8; Roper on Legacies, vol. i. p. 879. 2. Because the respondents, being aware of the embarrassed circumstances of the appellant's father, were not justified in paying over to him the appellant's share of the trust funds, but should have applied to the Court of Session to interpone its authority to the course to be followed by them, and, not having done so, they were liable in payment to the appellant. 3. Because the respondents having extrajudicially accepted of caution, and not sought judicial caution, they must take on themselves the responsibility of making that caution effectual.—*Holloway* v. *Collins*, 1 Ch. Cas. 245. 4. Because, in point of fact, payment of the legacy was made to Michael Waddell, one of the cautioners, and in whose hands the funds were placed entirely beyond the control of the legal administrator. 5. Because, in any view, the appellant was entitled to have added to the record the statements contained in the minute, No. 340 of process, before quoted.

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[1] See previous reports 19 D. 462: 29 Sc. Jur. 213. S.C. 4 Macq. Ap. 1: 33 Sc. Jur. 269.

Stevenson's trustees supported the judgment on the following grounds: 1. Because the interlocutor of the Court of Session of 13th January 1857, refusing to allow additional statements and new grounds of action to be added to the record, was well founded and in accordance with the statutes—Act 6 Geo. IV. c. 120; *Mackintosh* v. *Cheyne*, 8 S. 356; *Kay* v. *Miln*, 8 S. 437; *Wilson* v. *Jamieson*, 5 S. 518; *Boswell* v. *Ogilvy*, 11 D. 185. 2. Because the share of the trust funds belonging to the appellant was a vested interest, and, at the time it was paid to his father, was then exigible from the trustees. 3. Because the appellant's father, John Dumbreck, senior, as his administrator in law, was entitled to receive payment of the trust monies in question, and his discharge to the trustees for the amount was valid and effectual—Stair, 1, 5, 12; More's Notes on Stair, p. 31; Bank. 1, 6, 2, 4; Ersk. 1, 6, 54; 1 Darling's Practice, p. 88; Parker's Styles of Summonses in the Court of Session, Art. 3, p. 6. 4. Because there are no special circumstances in the present case alleged or proved to invalidate the discharge, or to render the respondents liable in the appellant's claim—*Johnston* v. *Wilson*, 1 S. 558.

*Mundell* and *Mair* for the appellant.—The natural right of the father to be administrator in law of his children was restrained in this case by the terms of the trust deed; and accordingly the duty of the trustees to see to the application of the money was all the stronger. Even at common law the right of the father to receive legacies for the child is qualified by an exception, where he is insolvent or embarrassed. It is well settled in England, that an executor is not justified in paying an infant's legacy to the father.

[LORD CHANCELLOR.—You had better keep to the law of Scotland, as this is a case peculiarly of Scotch law.]

The above exception is well settled in Scotland—*Govan* v. *Richardson*, M. 16,263; *Wilkie* v. *Dalziell*, M. 16,311; *Graham* v. *Duff*, M. 16,383. The trustees, therefore, who well knew of this embarrassed state of the father, ought not to have paid without a decree of the Court of Session. They ought not to have been contented with ordinary caution, and must take the risk of that caution being insufficient. It was also an improper exercise of discretion in the Court of Session to prevent the appellant adding matter to the record, which would shew the knowledge of the trustees, that the father was embarrassed. In the circumstances of this case, considering, that the record had been closed before certain important documents had been recovered which shewed these matters, it was reasonable, that an application to add to the record should be granted.

*Rolt* Q.C., and *Anderson* Q.C., for the respondents, contended, that the application to add to the record after it was closed was contrary to the well-established practice—6 Geo. IV. c. 120, § 10; Act of Sederunt, 11th July 1828, § 47. A series of cases under this statute has settled the point. As to the merits, it is well settled in Scotland, that the father, as administrator in law, was entitled to receive payment of the legacy, unless there are very special circumstances against him—Stair, 1, 5, 12; More's Notes, xxxi.; Bank. 1, 6, 2; 1, 6, 4; Ersk. 1, 6, 54; M. 16,221, 16,353, 16,250. Here the trustees took caution which was good at the time, and they did all that was requisite in the circumstances.

LORD CHANCELLOR CAMPBELL.—My Lords, having heard this case fully and ably argued, and entertaining no doubt upon it, I think I should not be justified, if I were to propose to your Lordships any postponement of our decision upon it. The litigation has already lasted longer than the siege of Troy; it is now in its twelfth year, and I should be sorry to prolong it for twenty four hours more.

The first question is, whether the addition ought to have been allowed to the record. That is a matter of procedure upon which this House would be reluctant to interfere with the Court of Session; but I must say, that I entirely agree in their decision. It appears to me, that the Act of Sederunt placed actions of multiplepoinding upon the same footing as other actions. And under the circumstances in which this case stood, after it had been, I think, eight years under litigation, and in the stage at which it had arrived after the reclaiming note to the Inner House, in my opinion, if there had been ample discretion, it would have been an ill exercise of discretion if the amendments had been allowed, for it would only have led to confusion and embarrassment, and would have been of no advantage to any party concerned.

Then we have to consider whether, upon the record as it stands, the interlocutors appealed from ought to be affirmed. Now I am clearly of opinion, that they ought. It is allowed, that by the general law of Scotland the father is the administrator for the pupil; and when we look at this settlement we see, that there clearly was nothing in the settlement, that was at all to abridge the power of the father as the administrator for the son. Then, that being so, we have to consider, whether the mere poverty of the father would be a sufficient ground for refusing the payment to him of what was due to the son. I am clearly of opinion, that poverty of itself would not be a sufficient ground. Men, whether in Scotland or in England, may be poor, but although they are poor they are honest; and it is unreasonable to say, that a cottager, whose son has had a small legacy left to him, is not to be entitled, because he is poor, to receive the money which may enable him to send the poor boy to school, and give him a chance of making his way in the world, but that he must waste his money in applying to the Court of Session for security that it shall be duly administered. If there has been on his part *mala fides*, or, as it may be called,

conclusion is, that it had there been either proved or admitted that the witness was abroad. Here it was not proved, and the respondent had it in his power to satisfy the Court by witness or affidavit that the deponents were abroad, if he could, for the objection was taken at the trial three times. The same remarks are true of the act of sederunt 1841, § 17, the two acts being identical on this point: per *Boyle* L. J. G. 24 Sc. Jur. 80. It is said the practice is against us; but if so, a practice since 1841, running counter to the plain words of the act of sederunt, cannot avail. Practice is a useful guide only where the act is ambiguous. Besides, cases may have occasionally occurred where evidence of foreign residence was not given, simply because the parties had previously arranged to use the depositions. The Court cannot relax a peremptory rule laid down by an act of sederunt, which is of the same authority as the statute authorizing it—*Scott* v. *Gray*, 4 Mur. 61; and the Court will enforce it strictly—*Willox* v. *Farrell*, 10 D. 807. The true construction is, that proof of non-ability to attend in person, whether by illness, absence, or residence out of the jurisdiction, is a condition precedent to the deposition being received. 2. The *second* exception is, that as the charger was not bound in point of law to prove a consideration, the presumption being that value had been given, the Judge refused to direct the jury to that effect. The Judge recommended, *i. e.* left to the discretion of the jury, to find a verdict against us—thus leaving them to deal with the law as well as the fact.

*Sol.-Gen. Inglis*, (with him *Sol.-Gen. Kelly*,) and *Anderson*, Q.C., for respondent. *1st Exception*—We must distinguish between what is sufficient evidence to the Court to let in the documents, and what would be sufficient to go to the jury. Here it appeared sufficiently on the face of the report of commission, that the deponents resided abroad, *i. e.* in London—which was enough to satisfy the Court, the presumption being that the witness could not attend, as he was out of the jurisdiction. The act of sederunt 1815 did not contemplate the case of a foreigner residing abroad at all, the omission being supplied for the first time by the acts of sederunt 1825, § 28, and 1841, § 17. Now the latter part of § 17 (1841) contains no word which corresponds to the case of a foreigner mentioned in the former part of that clause. The only likely word, "absence," cannot apply to one who, being a foreigner, may never have been in Scotland—it was not rendered necessary, therefore, by the act of sederunt 1841, to be proved, that the foreigner could not be produced in person. The first two cases cited being prior to 1825, do not apply to the case of a foreigner. In *Mackay* v. *M'Leod*, for aught in the report, the objection may have been, that there was no evidence of the deponent being a foreigner. As to *Wight* v. *Liddell*, the counsel there having the evidence in his power and at hand, tendered it merely as a matter of prudence, but not because it was necessary. Armstrong's was a case of a Scotsman temporarily absent, and therefore it was reasonable to shew that he was not likely to return. The other cases do not apply. Then, even if the language of the act of sederunt was doubtful, we have the authority of the leading judges that it has never been the practice for the Court to exact evidence that the foreign deponent could not attend. 2. This exception was groundless, for the law, asked by the appellant to be laid down by the Judge, was neither sound nor necessary. As to the Judge recommending the jury, that meant that he directed the jury.

LORD CHANCELLOR ST. LEONARDS.—My Lords, there are two questions here for your Lordships' consideration, one of which is upon the acts of sederunt of 1825 and 1841, and the other is upon the charge of the Judge to the jury. As regards the question on the acts of sederunt, it is impossible to deny, that where rules of Court are sanctioned and directed by an act of parliament, with the view of seeing if the opinion of the Judges is true and correct, in a very great sense you must consider the acts that were in force hitherto, and which ought not, without some sufficient ground, or some good authority, to be upset. Where an act of parliament authorizes rules of Court to be made by the Judges, they must have, not a forced, not an unnatural, but a flexible construction put upon them—that is, such a construction as, from the nature of the decisions, the Court would have been likely to put upon its own rules if they had remained in the way they had hitherto been—not disregarding them—not overlooking them—not neglecting the terms of them—but giving that natural construction which the Court itself, exercising the power delegated to it by act of parliament, would have intended to have put upon the words that are used. Now, the act of sederunt of 1815 does not provide, as is observed, in terms, for residence abroad, although it does provide for persons being abroad who are not likely to return; and it is suggested from those terms, that the clause of the act means persons who are resident in Scotland, but who have gone abroad, and, from some cause, are not likely to return; and that explains the cases which are quoted upon the subject of that act of sederunt, which were cases relating to a disability from attending, arising from illness, and having no bearing on the question of residence abroad. So that the question turns on whether residence abroad is, or is not, in the second branch of the acts of sederunt. If it had not been, no one can deny that the second branch, whatever may be the cases it refers to, requires that it ought to be proved as to those cases, at the time of the trial, that the party is absent from the cause stated, either that of disability or sickness. It is not because you get a commission, and say the necessity for it has arisen from the sickness of the party, that you can, under the act of parliament, or under the act of sederunt, read that commission without proving at the time of the trial, that the party is prevented

insolvency in one sense of the word, I should think the trustees would be guilty of a breach of trust if they were to pay over the money to the father. I think that, looking at the admission of which I give the appellant the advantage—that there was something more than pure poverty; that there was embarrassment of circumstances, that might have rendered something more necessary to be done than barely paying over the money to the father, and allowing him to dispose of it as he pleased—I think, upon the authority of *Govan* v. *Richardson*, and the other cases which have been referred to, that there would have been strong ground for contending, that it would have been unjustifiable, in this case, for the trustees, under the circumstances which the trustees acknowledge to have existed, to have simply paid the money over to the father. But instead of that they do what, if there had been an application to the Court, the Court would have directed. They obtained caution from cautioners who were substantial at that time, and their solvency was inquired into and established to be perfectly sufficient for this purpose. And it was under these circumstances that the payment was made. Now, whether it was made directly to the father, or to Waddell, the cautioner, and the father got the money afterwards, seems to me immaterial. Whether it was given to Waddell, or whether it was given to the father, I think that, after the caution had actually been given, the trustees had a right to make the payment as they did.

I think it would be a waste of your Lordships' time if I were to enter more into detail upon the facts of the case and the law which belongs to them, and I shall therefore only move your Lordships, that the interlocutor be affirmed, and the appeal dismissed; but, as the appellant is suing *in formâ pauperis*, of course there will be no costs.

*Interlocutors affirmed.*

*For Appellant*, Dodds and Greig, Solicitors, Westminster; David Manson, S.S.C., Edinburgh. —*For Respondents*, Deans and Rogers, Solicitors, Westminster; Wotherspoon and Mack, W.S., Edinburgh.

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FEBRUARY 21, 1861.

## ROBERT EVANS, *Appellant*, v. JOHN M'LOUGHLAN, *Respondent*.

Justice of Peace—Jurisdiction—Court of Session—Illegal Imprisonment—Excise—7 and 8 Geo. IV. c. 53—19 and 20 Vict. c. 56, § 17—Suspension and Liberation—Review—*M. was apprehended by excise officers for an offence against the Excise Acts, on 22d and detained without warrant till 24th, when he was taken before a Justice, and charged with the offence.*

HELD (reversing judgment), *That as the delay was caused by the difficulty in finding a Justice, there was nothing illegal in the detention.*

HELD *further, That as any review was taken away by the statute for mere irregularities in procedure, the suspension of the conviction was incompetent.*[1]

The suspender, a miner, residing near Airdrie, was apprehended near an illicit still for the manufacture of spirits, on 22d March 1858, by the respondent and Alfred Eyeres, both officers of excise. According to the suspender's statement he had, after quitting his work on the afternoon of the above day, "come accidentally near to a place where there was a still for the distillation of spirits. He had never seen a still before in his life, and he did not know, and had nothing whatever to do with, the parties to whom the still, referred to, belonged. When indulging his curiosity" "he was suddenly laid hold of by the respondent and Alfred Eyeres, another officer of excise, and certain police constables who had been concealed in the neighbourhood, on the allegation of being concerned in the illicit operations of the said still. The complainer told the respondent and his assistants who he was, from whence he had come, and that he had nothing whatever to do either with the parties to whom the still belonged, or with the operations they might have been carrying on; and referred the respondent to his neighbours for evidence of what he then stated. The respondent, disregarding these statements, forthwith handcuffed the complainer, and carried him off" to Airdrie, where he was lodged in prison on a writing, made out by the respondent, bearing that the suspender was "detained at the request of Robert Evans, excise officer, Clarkstone, and Alfred Eyeres, excise officer, Airdrie."

The suspender was detained in prison the rest of the 22d, the whole of the 23d, and until the forenoon of Wednesday the 24th March 1858, without any warrant having been obtained, and he was not brought before a magistrate till the forenoon of the 24th, when he was brought up

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[1] See previous report 31 Sc. Jur. 275. S. C. 4 Macq. Ap. 89: 33 Sc. Jur. 293.