the distinction I have been drawing is to be found in the case of Miller, 5 S. 765 (N.E.)

Then the only remaining question comes to be, has the Sheriff exceeded his jurisdiction? Whatever opinion we might entertain on the merits of the question involved, it is clear that the Sheriff committed no excess of jurisdiction. I propose that, substantially, we should adhere.

Lord COWAN said—My opinion may be stated in a few words. The proceedings before the Sheriff were regularly taken before the statutory judge. The 397th and 437th sections of the Act protect his judgment from review. No reduction can be entertained, and the declaratory conclusions, as ancillary to the reductive, must fall with them. I look upon this action as a covert attempt to obtain review. I think the fifth paragraph of the Lord Ordinary's note ("It is plain, indeed," &c., down to "jurisdiction of this Court under the declaratory conclusions") contains reasons enough for the decision of this case.

Lord BENHOLME—I can't go along with the Lord Ordinary's judgment on the first ground upon which it is rested, as the object of this action is the application of a general descriptive clause of the statute to a particular subject. Nor can I think that this action seeks to have an abstract proposition declared in the sense of one of no interest to the parties. The ground upon which my opinion that this is an incompetent action proceeds is, that the Sheriff's jurisdiction is final and privative. I think it would be very inconvenient were it final and not privative.

Lord NEAVES—I concur that the subject of this suit is not an abstract question, and with all your Lordships upon the incompetency of this action.

Judgment accordingly, dismissing the action, and finding the pursuers liable in additional expenses.

Counsel for the Pursuers—The Solicitor-General and W. Ivory. Agent—William Mitchell, S.S.C.

Counsel for the Defenders—The Lord Advocate, Clark, Pattison, and A. Moncrieff. Agents—James Lamond, S.S.C., and Scott Moncrieff & Dalgety, W.S.

BONES *v.* MORRISON AND OTHERS.

Executor—Next of Kin—Title to Office—Title to sue and insist in an Action—Exception to Title—Representatives of Next of Kin—4 Geo. IV., cap. 98, sec. 1. Held by Lord Barcaple (acquiesced in and approved of), that an objection by a debtor of an executry estate to the title of the executors upon the ground that they did not possess the character ascribed to them in the decree-dative could not be sustained by way of exception. Held (alt. Lord Ormidale) that next of kin, or the representatives of such, were entitled to the office of executor, though not beneficially interested in the estate, in the absence of competition.

This was an action at the instance of persons designing themselves executrices-dative *qua* surviving next of kin of a Mrs John Maclaurin against the trustees acting under the will of the deceased John Maclaurin. The conclusions of the action were for count, reckoning, and payment with regard to one-half of the goods in communion betwixt Mr and Mrs Maclaurin at the date of her death.

Mrs Maclaurin died on 5th September 1825, childless and intestate. The pursuers were her nieces, and produced as their title a decree-dative in their favour as executrices-dative *qua* surviving next of kin of her, dated 7th October 1864. Mrs Maclaurin was survived by her husband, who died in 1838. He left a settlement dated in 1837, under which the defenders are trustees.

The pursuers say that by Mrs Maclaurin's death as aforesaid one-half of the goods in communion devolved upon her next of kin, and that the same is now vested in them, and falls to be recovered and administered by them. They admit that at the date of Mrs Maclaurin's death they were not her next of kin, and that her nearest of kin then was their mother, Mrs Bone, who, they further admit, was survived by their father, Mr Bone, who is now also dead. The pursuers further say that they are the next of kin of their father as well as of their mother.

The defenders, on the other hand, averred that the pursuers did not represent any of those who were next of kin to Mrs Maclaurin at the time of her death, for, on the assumption that Mrs Bone, their mother, had such a claim, it was transferred to her husband *jure mariti*. They therefore pleaded—1st, As the pursuers do not represent the parties who were Mrs Maclaurin's next of kin at her death, they are not beneficially interested in her succession. 2d, The pursuers' title as libelled in the summons being not only unsupported but contradicted by their averments on record, the action should be dismissed.

In their original defences, the defenders had stated a preliminary plea in these terms—"The pursuers have no title to sue. They do not represent the parties who were Mrs Maclaurin's next of kin at her death." This plea was upon 27th June 1865 repelled by the Lord Ordinary (Barcaple) "as an objection to the title to sue," and this judgment was acquiesced in.

Parties having been heard upon the closed record, and the first two pleas in law above quoted, Lord Ormidale (Ordinary) sustained the same, and dismissed the action, and found the defenders entitled to expenses. In a note his Lordship said—

"The pursuers have brought, and now maintain, this action 'as executrices' dative *qua* 'surviving next of kin of the deceased Mrs Arabella Bell or Maclaurin.' Such is their title, and their only title libelled; and they conclude for count, reckoning, and payment of the amount of the goods in communion betwixt Mrs Bell or Maclaurin and her husband at the death of the former in 1825.

"In answer, however, to stat. 6 for the defenders, it is admitted that 'at the time of Mrs Maclaurin's death, the present pursuers were not among her next of kin, her sister, Mrs Alice Bell or Bone, the mother of the pursuers, being then alive.' The pursuers go on also to admit that at 'Mrs Maclaurin's death the pursuers' mother was married, and that she was survived by the pursuers' father, who died a few years ago.' The pursuers no doubt further add that they are executrices and next of kin of their father, as well as their mother, and that the interest which fell under their father's *jus mariti* devolves on them.

"Now, in the first place, the Lord Ordinary holds it to be clear that the pursuers can take no benefit in the present action—in the summons in which they expressly state that they sue as the next of kin or executrices dative, not of their father or mother, but of Mrs Maclaurin, who appears to have been their aunt—from the allegation introduced for the first time into their revised condescendence that they are also executrices and next of kin of their father and mother, in support of which they have neither libelled nor produced

any decree-dative or other title whatever. Indeed, the Lord Ordinary might have been warranted in sustaining the defenders' ninth plea in law, which is to the effect that as the pursuers' claim as executrices of their father and mother was incompetently introduced at adjustment, it could not be regarded at all; but he has thought it unnecessary, and better not to do so, as the mere allegation that the pursuers are next of kin to their father and mother, as well as their aunt, may be said to have been called for and made in consequence of the statement in the defences.

"If, then, the allegation by the pursuers in the revised condescendence, that they are the next of kin of their father as well as their mother, cannot either add to or detract from their right and title as libelled, the question comes to be, whether that alleged right and title are sufficient, in the face of the admissions of the pursuers in their answer to the 6th article of the defenders' statement of facts. The Lord Ordinary is of opinion that they are not, in respect that by the statute 4 Geo. IV., cap. 98, sec. 1, all the right to the goods in communion in question, as now claimed by the pursuers, must be held to have vested without confirmation in their mother, Mrs Bone, and been transmitted from her to her husband *jure mariti*. Nor can the Lord Ordinary hold it to be of any materiality that the pursuers have produced a decree-dative in support of their title as executrices and next of kin of their aunt, Mrs Maclaurin, as the claim or debt in question is no longer *in bonis defuncti* of her, but has passed to her sister, Mrs Bone, and from her to her husband. A decree-dative being at any rate only an inchoate proceeding, can in no view give efficacy to a title which, on the pursuers' own showing and admission, is both in fact and law inapplicable to the circumstances of the case.

"For an illustration of the manner in which the statute 4 Geo. IV., c. 98, has been held to operate in circumstances involving the same principles as the present case, reference is made to the case of Mann or Smith and Husband *v.* Shands, 9th Feb. 1830, 8 Sh. 468."

The pursuers reclaimed.

A. R. CLARK and WATSON, for them, maintained that the pursuers were entitled to insist in the action; that the defenders could not get behind the decree-dative by way of exception; that they were entitled to the office of executor whether beneficially interested in the succession or not, and although they were not next of kin to the defunct at the date of her death. But, further, they were beneficially interested, as upon Mrs Maclaurin's death the right to one-half of the goods in communion devolved upon Mrs Bone, and, upon the death of the latter, upon them.

GIFFORD and ORR PATERSON, for the defenders, maintained that the pursuers having admitted on record that they were not next of kin to Mrs Maclaurin at the date of her death, could not maintain the action in that character. The decree-dative was a mere inchoate proceeding, which if the pursuers' admissions were correct could not be completed by confirmation in the character libelled. The pursuers had made up no title as "representatives of next of kin." That was not the title founded on in the summons, and even assuming the pursuers to possess that character, it could not aid them in maintaining the present action. The right to Mrs Maclaurin's estate being transmitted to the representatives of her next of kin at the time of her death, the defenders would not be in safety to pay to, and were not bound to litigate with, the pursuers. Frith *v.* Buchanan, 3d March 1837.

At advising,

The LORD JUSTICE-CLERK—The title libelled by the pursuers is that of *executrices-dative qua* surviving next of kin of the deceased Mrs Maclaurin, and that title is supported and proved by the production of a decree-dative in their favour. But a preliminary objection was taken, which was the first plea in law in the original defences, that the pursuers had no title to sue as they did not represent the persons who were Mrs Maclaurin's next of kin at her death. The Lord Ordinary repelled that plea, and his judgment was acquiesced in. The meaning of that plea I take to be either that the decree-dative proceeded on a false allegation of fact, or that though true in respect of the fact on which it proceeded, it didn't entitle the pursuers to be confirmed. The meaning of that plea is very material in the determination of the question now raised. I rather apprehend that what was meant was that the pursuers, under 4 Geo. IV., c. 98, being what they are, representatives of next of kin, were not entitled to sue for or recover the estate of an intestate. If that was the meaning of the plea, the decision upon it would exclude the pleas now sustained by the Lord Ordinary. But as there may be some doubt as to that having been its meaning, I am very willing to take the other view—that it was intended that the parties did not possess the character ascribed to them by the commissary. In that view there can be no doubt of the propriety of the Lord Ordinary repelling the plea. The idea of reducing the decree of a Court of competent and privative jurisdiction and sustaining such a plea *ope exceptionis* would have been altogether out of the question. After that plea was repelled, a record was made up, and two pleas have been stated which we must assume not to be the same as that repelled, or they would not have been stated again. These are pleas not against the pursuers' title to sue, but to insist and prevail in the conclusions of the action. Now, as regards the first of these pleas, it seems to me to proceed on this assumption that a person not beneficially interested in the estate of a defunct cannot be confirmed. That I think is a mistake. The second plea says, that because of the facts admitted on record, the pursuers cannot in point of fact have a title to insist. That I think proceeds upon the same mistake as is the foundation of the first plea. It is said that the pursuers are the children of one of the next of kin of the intestate, but that the marriage of their mother, who was the next of kin transferred by the assignation implied by marriage, the right to the estate of the defunct to her husband, and that her representative in that was necessarily her husband, and those claiming through him; and, therefore, the pursuers, as not beneficially interested in the estate of the defunct, could not be lawfully confirmed, and cannot now insist in this action. What is the position of these ladies, the pursuers? Upon the decease of Mrs Maclaurin, their mother was her next of kin. They call themselves, or are so-called by the commissary, "surviving next of kin of Mrs Maclaurin." Now, this is perhaps not a very accurate description of those coming in place of next of kin; but the meaning is, the remaining existing kindred nearest to the intestate. Supposing that to be so, the only remaining objection to their title to insist is, that it is said they are not beneficially interested in the defunct's estate. Now,

is it so in point of fact? The right to it was vested in their mother, transferred to her husband *jure mariti*, and remained vested in him *stante matrimonio*. But what happened on the dissolution of the marriage? Was there not a division of the goods in communion—one-half going to the children of the deceasing wife—so that they came to their right as representatives of their mother to the extent of one-half?

But even supposing they were not beneficially interested in the defunct's estate, I am disposed to hold that their right of kinship gives them a title to be confirmed. No doubt our law has of late disregarded propinquity as against persons beneficially interested in the succession. But that has only been when there has been a competition. [His Lordship then referred to the practice in the 15th and 16th centuries, and referred to the Act 1540, cap. 120, as showing that the office of executor did not necessarily belong to the *hæres in mobilibus*, and explained that it was known historically that that Act had been extended in its operation to the estates of persons of full age. Beneficial interest was not a necessary title under that Act to obtain confirmation. His Lordship thereafter referred to the further history of, and legislation with regard to, the office down to the beginning of the seventeenth century, to show that, so far as it went, it was never thought to be *necessarily* attached to beneficial succession, or in other words that a beneficial interest gave the *only* title to the office. His Lordship then proceeded] — This view is confirmed in a very strong way by Mr Erskine, ii. 2. 3, where he plainly distinguishes between those called *executors* because they are next of kin, and those so called because they administer the estate. And again, in iii. 9. 32, he says—"By the former practice so great attention was given to the distinction already stated between the office of executor and the right of succession, that a universal legatee, if he was not also appointed executor by the deceased, was not admitted into the office if either next of kin, widow, or creditor appeared to oppose him,' &c. Now that practice of refusing to confirm a universal disponee as against the next of kin (who could not of course have been interested in the succession) lasted down till past the middle of last century. It was only then that the practice was changed by the solemn judgment of this Court in the case of Crawford (Jan. 19, 1755, F.C. 1. 125, M. 3818). But although that judgment determined that a universal disponee was preferable to the next of kin, it did not determine that the next of kin, though not beneficially interested, had no title to the office of executor. I have no doubt, if the records of the Commissary Courts were examined, it would be seen that the title of kinship, though not good as against a universal disponee or a creditor, has been thought perfectly good in the absence of any one showing a preferable title.

The objection with which I have been dealing is one stated by a debtor to the executry estate, not by one who could have competed with the executors for the office. Therefore, unless the defenders could make out that the pursuers could not give them a good discharge for the debt, they are not entitled to challenge their title, and I must repeat, that having *ex facie* a good title, it cannot be challenged *ope exceptionis*, whatever may be the law as to the necessity for the pursuers confirming before decree or extract. The title is also good in fact as well as *ex facie*. The pursuers are possessed of a character to entitle the Commissary to confer the title. This objection has been stated to their insisting in the action. It may be that they must confirm before discharge, and for aught I see, the defenders may yet contend that the pursuers can't get decree as having no beneficial interest in a decree. These are questions as to the pursuers' right to prevail to a judgment upon which I give no opinion at present. But with regard to the title to insist in this action, I think the two pleas sustained by the Lord Ordinary ill-founded, and that we ought now to repel them in so far as they contain an objection to the pursuers proceeding with this action.

The other Judges concurred in opinions of considerable length.

The Court therefore recalled the Lord Ordinary's interlocutor, and repelled the defenders' two pleas, with expenses since the date of the Lord Ordinary's interlocutor.

Agent for Pursuers—L. M. Macara, W.S.
Agents for Defenders—J. & A. Peddie, W.S.

DUKE OF BUCCLEUCH *v.* COWAN AND OTHERS (*ante*, vol. ii. p. 253).

Property—Private Stream—Pollution—Upper and Lower Heritors—Bill of Exceptions. In advising a bill of exceptions to the charge of a Judge, Held, affirming the charge—1. That an upper proprietor is not entitled to discharge anything into the stream so as to render it unfit for its primary purposes. 2. That a use of the river for secondary purposes may be prescribed. 3. That a lower proprietor complaining of the pollution of the river as it passes through his land is entitled to a verdict against every upper proprietor who can be proved to have materially contributed to the pollution. Exceptions against the refusal to give special directions disallowed.

The bill of exceptions in this case, in which a discussion took place sometime previously, was advised to-day.

The Lord Justice-Clerk at the trial had given the following directions to the jury:—His Lordship said that, in point of law, there was a marked and important distinction between the rights of proprietors on the banks of a public river and those of proprietors on the banks of a private stream; that the public rivers of this country are vested in the Crown for public purposes, and the uses which the proprietors or inhabitants on their banks may have of the water are entirely subordinate to these public purposes; but in a private stream the bed of the stream is the property of the owner of the lands on the banks; that he is entitled to the full and uncontrolled use of the water as it passes through his property, subject only to the conditions that he shall suffer it to pass undiminished in quantity, and unimpaired in quality, to his neighbours below; that these conditions, however, are necessarily subject to some modifications, because even in ordinary uses of water there is a certain unavoidable consumption of the body of the water, and that it is impossible to prevent running streams from receiving impurities to some extent from natural causes, and from causes incidental to the presence of inhabitants on their banks; but that an upper proprietor is not entitled to throw impurities, and especially artificial impurities, into the stream so as to pollute the water as it passes through the estate of a lower proprietor; that the lower proprietor is entitled to complain of such