

whereabouts were known. If the husband in this case were to return, he would undoubtedly be liable for the whole of the aliment of his family during his absence; and, in my opinion, he has not by his misconduct and neglect been deprived of the corresponding right to sue in respect of the death of his child.

In those cases in which a wife's title to sue by herself or with a curator *ad litem* has been sustained, the ground of action has always been one peculiarly personal to the wife, such as slander or assault upon her person.

Further, the cases in which one or more parties have been found entitled to sue in the absence of others are cases in which, if all the parties had appeared and concurred, they would have been all entitled to be conjoined as pursuers—*M'Quillan v. Smith*, 19 R. 375.

The Court dismissed the appeal, of new sustained the plea of no title to sue stated for both defenders, and dismissed the action.

Counsel for the Pursuer and Appellant—Watt, K.C.—Wilton. Agent—Alexander Bowie, S.S.C.

Counsel for the Defenders and Respondents—Constable. Agents—Mill, Bonar, & Hunter, W.S., and James Forsyth, S.S.C.

Wednesday, February 25.

## SECOND DIVISION.

[Lord Low, Ordinary.

### PATON v. PATON'S TRUSTEES.

*Succession—Legitim—Equitable Compensation—Expenses of Litigation on Disputed Claim for Legitim—Parent and Child—Provision to Children.*

A bankrupt during his father's lifetime granted a discharge of his right to legitim. His father died leaving a settlement whereby he left his whole estate to be divided among his children in equal shares, but he directed his testamentary trustees to hold the bankrupt's share for his behoof, giving him a right only to the revenue thereof as an alimentary liferent, and destining the fee of that share to the bankrupt's children. On the death of the bankrupt's father the trustee in bankruptcy intimated a claim for legitim. In answer to that claim the testamentary trustees founded on the discharge of the bankrupt's right to legitim, but after litigation they settled with the trustee in bankruptcy by paying about half of the ascertained amount of the bankrupt's legitim, each side paying their own expenses. In an action subsequently brought by the bankrupt against his father's trustees for an accounting, and for payment of his alimentary liferent, *held* (*aff.* judgment of Lord Low) that the testamentary trustees were only entitled to retain the

bankrupt's alimentary liferent to the extent necessary to reimburse to the estate the sum paid to the trustee in bankruptcy, and that the expenses which they incurred in the litigation with the trustee did not form a good charge against the pursuer's liferent, but were chargeable against the trust estate generally, the litigation having been conducted not in the interest of the bankrupt alone but of all the beneficiaries.

This was an action of count, reckoning, and payment, at the instance of James Middleton Paton, merchant, Dundee, against the testamentary trustees of his father John George Paton, The Wild, Broughty Ferry.

In October 1889 James Middleton Paton was rendered bankrupt in France, and a trustee was appointed on his estate.

In February 1891 the bankrupt granted in favour of his father a discharge of his right to claim legitim.

On 9th March 1891 John George Paton died survived by seven children, and leaving a trust-disposition and settlement whereby he directed his trustees to divide the residue of his estate equally among his children, but to hold the share falling to his son James Middleton Paton, and pay to him the revenue only as an alimentary provision during his lifetime, the fee being destined to his children.

In April 1891 James Middleton Paton's trustee in bankruptcy intimated a claim for his share of the legitim fund of his father's estate. In reply to this claim the trustees of John George Paton founded on the discharge above referred to, and raised an action in which they sought to have it declared that that discharge was valid and excluded any claim on behalf of the grantor's creditors. The trustee in bankruptcy then raised an action of reduction of the discharge and for payment of legitim. These actions were conjoined, and judgment was given in favour of the trustee in bankruptcy in the Outer House by Lord Kyllachy, and his judgment was affirmed by the First Division, decree being pronounced for £6667, 0s., 11d.—*Obers v. Paton's Trustees*, March 17, 1897, 24 R. 719, 34 S.L.R. 538.

The testamentary trustees of John George Paton intimated an appeal to the House of Lords, but a settlement was arrived at whereby the trustee in bankruptcy received payment of £3446, and assigned to the testamentary trustees his claim to James Middleton Paton's share of legitim, and each side paid their own expenses. The expenses incurred by the testamentary trustees amounted to £2522, 14s. 8d.

On 12th May 1899 James Middleton Paton raised the present action against his father's testamentary trustees for an accounting, and for payment of the alimentary liferent provided to him by his father's settlement.

The defenders produced accounts, and contended that, as the pursuer had by his trustee claimed and taken his legal rights in his father's estate, he could take no benefit from the provision made in his

father's general settlement until the estate had been compensated to the extent to which it had been diminished in consequence of that claim, that is, to the extent of the two sums specified above, viz. (1) £3446 paid to the son's trustee, and (2) £2522 the expenses of the litigation, amounting together to £5968, 14s. 8d., and that it would be many years before that sum was made good by the pursuer's alimentary liferent.

The pursuer lodged various objections to the defenders' accounts. *Inter alia*, he objected that the trustees were not entitled to include in the amount to be compensated out of the pursuer's liferent the expenses of the litigation between the defenders and the pursuer's trustee in bankruptcy, amounting as stated to £2522, 14s. 8d. For the purposes of this report it is not necessary to state the other objections.

On 7th November 1902 the Lord Ordinary (Low) found, *inter alia*, that the expenses incurred by the defenders in their litigation with the pursuer's trustee in bankruptcy did not form a good charge against the pursuer's alimentary liferent.

In an opinion annexed to a previous interlocutor the Lord Ordinary stated as follows:— . . . "Now, it is not disputed that the defenders are entitled to retain the income to which the pursuer would otherwise have been entitled in order to replace the amount of the legitim. It is difficult to understand, however, upon what principle the whole expenses of the litigation should be charged against the pursuer's income. Such a course might perhaps be justified if the litigation had been conducted solely in the interest of the pursuer, but that does not appear to have been the case.

"The litigation arose in this way—The pursuer after his bankruptcy, but during his father's lifetime, had granted to the latter a discharge of his right to claim legitim. After the father's death the defenders brought an action against the pursuer's trustee, and also against the beneficiaries, including the pursuer, and against certain of the pursuer's creditors, for declarator that the discharge excluded any claim for legitim. The trustee lodged defences and brought a counter action for reduction of the discharge and for declarator that he had the sole right to claim the legitim falling to the pursuer. The action was directed against the present defenders and all the beneficiaries. The present defenders alone lodged defences, and a protracted and singularly expensive litigation ensued. It seems to me to be plain that the defenders acted in what they regarded as the interests of the beneficiaries as a body, and for the purpose of preventing the amount of the pursuer's legitim being withdrawn from the estate, which the truster had directed to be divided among all the beneficiaries.

"In these circumstances it seems to me to be unjust that the pursuer should be made to bear the whole expenses of the litigation. The defenders were not found personally liable for the expenses, and as that is a matter which falls to be determined in the litigation in which the ex-

penses are incurred, it must be taken that they are entitled to be relieved of the expenses by the trust estate. But I think that it is the whole trust estate which must be charged with the expenses, and not the pursuer's separate interest in it only. If the trust estate is charged with the expenses, the result will be that, by the amount of these expenses the estate divisible among the beneficiaries will be diminished, and in that way all the beneficiaries in whose interest the litigation was conducted will bear a share of the expenses. The pursuer will bear his own share, because the one-seventh of the estate, to the income of which he is entitled, will be diminished to the extent of one-seventh of the expenses, and the income payable to him will of course be proportionately diminished." . . .

The defenders reclaimed, and argued—The principle of equitable compensation applied to all loss sustained through the claim of legal rights, and was not confined to the actual amount of the sum paid in satisfaction of the legal right—*Macfarlane's Trustees v. Oliver*, July 20, 1882, 9 R. 1138, 19 S.L.R. 850. Here the expenses in question were incurred in defence of the pursuer's own deed and in his interest, so as to protect him from the diligence of his creditors. They resulted in a settlement more favourable to him than if the discharge had not been defended, and although in the first place the claim fell to be paid out of the trust estate, and the interest to reduce the amount was primarily in the other beneficiaries, still the claim fell to be repaid out of the pursuer's provision and the radical interest to reduce the amount was in him. Alternatively, on the assumption that the whole interest was in the beneficiaries generally, the defenders had purchased for the benefit of the trust estate the whole claim of legitim, and they were entitled under the assignation which they had obtained to treat as legitim everything they had disbursed up to the full ascertained amount thereof.

Argued for the pursuer—The expenses in question were entirely for the benefit of the trust estate. The loss occasioned by the claim of legitim fell on the trust estate, and on the trust estate alone, until by his survivance the pursuer had enabled the defenders to operate compensation; and it was admittedly to the interest of the beneficiaries to reduce the amount of that loss. No expenses could be included as a subject for compensation which were not incurred primarily and solely for pursuer's benefit. On the alternative argument an alimentary liferent could not be retained against a contractual debt.

LORD TRAYNER—I had some difficulty at first in ascertaining the exact ground on which the Lord Ordinary's interlocutor was challenged by the defenders, but it became clear enough on a consideration of the whole pleadings and the argument addressed to us. I am of opinion that the Lord Ordinary is right. His Lordship refuses to

charge the expense of a certain litigation against the liferent right which the pursuer takes under his father's settlement. The way in which these expenses came to be incurred was this. The pursuer was a bankrupt, and some time after his bankruptcy his father and he appear to have come to an agreement that the pursuer should discharge his legitim. That left him of course absolutely in the hands of his father, who might then have left him either more or less, as he pleased, in his trust-settlement; but the purpose of the discharge evidently was that the share of the estate which the father destined to his son should be protected against claims by any creditor which would reduce the sum the son was to get. Accordingly in his settlement, while the father directed his whole estates to be divided into seven equal parts among his seven children, he directed that the pursuer's share was to be held by the trustees for his behoof, giving him a right to the revenue thereof as an alimentary liferent, destining the fee of that one-seventh to the pursuer's children. But on the death of the truster, the trustee in the pursuer's bankruptcy, who was vested in all the rights belonging to the pursuer, came forward and claimed what was due to the pursuer as legitim. Thereupon the defenders put forward the discharge granted by the pursuer to his father as an answer to that claim. The trustee in bankruptcy challenged the validity of that discharge, on which the defenders brought an action to have it declared that the discharge was valid and excluded all claims on the part of the trustee in bankruptcy. The trustee in bankruptcy then brought an action of reduction of the discharge, in which he was successful; the discharge was set aside by the judgment of the Court. Parties therefore stood in this position, that there was a claim by the trustee in bankruptcy against the trust estate which amounted with interest to something over £7000. Now, if that claim had been paid every one of the beneficiaries of the trust, the pursuer's children as fiars in his one-seventh, and the other children, would have each lost a sum of about £1000. But the defenders settled with the trustee in bankruptcy by paying him a sum amounting to little more than about one-half of his claim, and they thus saved one-half of the claim for the benefit of all the beneficiaries under the trust.

The question that now arises is, whether the expenses incurred in defending the trust against the claim of the trustee in bankruptcy were expenses chargeable against the trust estate, or, as is contended by the reclaimers, chargeable entirely against the liferent interest of the pursuer. I think the answer to that question depends, as the Lord Ordinary has said in a previous interlocutor, upon whether or not the litigation had been conducted solely in the interest of the pursuer or also in the interests of the trust estate generally. And it is not immaterial to notice, as Mr Gunn has pointed out, that upon the record the defenders admit that the compromise and settlement they made was beneficial not

only to the pursuer but beneficial to the trust estate. In these circumstances it appears to me that the expenses now in question were, as the Lord Ordinary has held, expenses incurred in defence of the trust estate for behoof of the whole beneficiaries, and therefore in my opinion they form a good charge against the trust funds. There is no doubt that the amount paid to the trustee in bankruptcy must be repaid to the estate out of the pursuer's life interest as equitable compensation to the other beneficiaries before he can claim anything; but that he should also be required to give up his life interest to the extent necessary to pay these expenses would be defensible only on the ground that the litigation had been solely in his interest, and I think I have shown that that was not so. The argument last addressed to us by Mr Salvesen, on the effect of the assignation by the trustee in bankruptcy in favour of the defenders, is one on which I do not intend to enter, I do not think that question is raised by the interlocutor now under review, and I do not propose to offer any opinion as to the extent to which the defenders would be entitled, if entitled at all, to plead that assignation in answer to the pursuer's claim for payment of his liferent. Dealing with the one question argued before us, as to where the burden of these expenses is to be placed, I am of opinion that the Lord Ordinary is right—that they should be placed upon and deducted from the general trust estate under the management of the defenders.

The LORD JUSTICE-CLERK and LORD YOUNG concurred.

LORD MONCREIFF was absent.

The Court adhered.

Counsel for the Pursuer and Respondent—Watt, K.C.—Gunn. Agents—Mackay & Young, W.S.

Counsel for the Defenders and Reclaimers—Salvesen, K.C.—J. Fleming. Agents—J. & D. Smith Clark, W.S.

*Tuesday, March 3.*

#### FIRST DIVISION.

[Exchequer Cause.  
[Lord Stormonth Darling,  
Ordinary.

SIR JOHN MUIR v. FORMAN'S  
TRUSTEES.

*Railway—Abandonment—Deposit Fund—Claims on Deposit-Fund—"Meritorious" and "Non-Meritorious" Creditors—Promoters—Solicitors and Engineer of Bill—Persons Employed by Solicitors—Process—Exchequer Petition for Warrant to Uplift Deposit-Fund—Mediate Claims Made Directly—The Muirkirk, Mauchline and Dalmellington Railways Act 1896 (59 and 60 Vict. cap. xxxvii.), secs. 45 and 67—The Muirkirk, Mauchline, and Dal-*