

but it was not known who all the claimants might be, and so the officer of court who held the fund raised a multiplepounding so that an order for claims might be made, and that the advertisement of that order might cause any others, persons who had claims, to come forward for their interest.

In that case it was the officer of Court who brought the case into Court, and here it is the next-of-kin; but surely the next-of-kin is entitled to do something to make useful this fund which has been lying by so long; and what could he do more than make the officer of Court bring a multiplepounding so that an order for claims might be made and the conflicting interests of parties determined.

I think that upon principle, and upon the ground that this form has been the practice of the Court, this action ought to be sustained as competent.

The Court recalled the Lord Ordinary's interlocutor and remitted to him to proceed.

Counsel for the Real Raiser—Sir C. Pearson—C. N. Johnston. Agents—Waddell & M'Intosh, W.S.

Counsel for the Nominal Raiser—Jameson—M'Phail. Agents—Melville & Lindesay, W.S.

Friday, July 18.

SECOND DIVISION.

[Lord Trayner, Ordinary.]

WATT v. ROGERS AND OTHERS (WATT'S TRUSTEES).

Process—Title to Sue—Accounting—Action by Beneficiary of Trust against Alleged Debtor to the Trust.

A beneficiary of a trust sued one of the trustees for count and reckoning and payment to the trustees of a sum alleged to be due to the trust-estate. She alleged that this sum was in the defender's hands at the truster's death, and that the other trustees refused to require any account of the defender's intromissions therewith. The defender alleged that the sum was received by her in gift from the truster and was presented to her as her own absolute property.

Held (diss. Lord Rutherford Clark) that in the circumstances the pursuer had a title to sue, and was not limited to the remedy of calling upon the trustees to raise an action against the defender, and if they declined, of obtaining the use of their names as pursuers by finding caution to free them from expenses.

The late William Roger senior, Dundee, died in December 1884, aged 87, leaving a daughter Janet Roger, who was insane and confined in an asylum near Dundee. There was a son William Roger, who predeceased his father, leaving a widow and seven

children. The eldest daughter was married to David Watt, produce merchant, Dundee. The others lived in family with their mother.

William Roger senior left a trust-disposition and settlement dated 10th December 1875 by which he appointed certain trustees and directed them to pay the whole yearly income of his estate after his death equally between his children William and Janet Roger, and in the event of the brother predeceasing her, which event happened, they were directed to pay or expend for behoof of his children the share which would have fallen to their father if alive, and on the death of Janet Roger they were directed to hold, pay, and apply the whole estate to and for behoof of the children of William Roger junior. By a codicil dated 14th February 1881 the truster provided that if William Roger's wife should survive him, which event happened, she should receive during her lifetime what her husband would have received if he had been alive. By another codicil dated 17th February 1883 the truster recalled the appointment of the original trustees and appointed Mrs Roger, the widow of the late William Roger junior, Daniel M'Ewan Roger, her son, and James Gray, joiner, Dundee, to be the new trustees. Upon the death of William Roger senior these trustees took possession of and entered upon the administration of the estate.

Upon 18th May Mrs Watt, with the consent and concurrence of her husband, raised an action against Mrs Roger as an individual and the above-named trustees to have them ordained to produce an account of their intromissions with William Roger senior's estate, and also to ordain Mrs Roger to pay to these trustees the sum of £1500 due by her to the estate.

The pursuer averred that the codicils were obtained from William Roger "while weak and facile by fraud and circumvention and undue influence exercised by the defender Mrs Roger to benefit herself." She averred also—"Deceased had a sum of between £800 and £900 deposited in the Dundee Savings Bank (Investment Department), and it is believed and averred that the defender Mrs Roger shortly after her husband's death in July 1881 uplifted the same and applied it to her own uses and purposes, and that without any authority from the deceased William Roger senior or anyone on his behalf. . . . The defenders, the trustees of the late William Roger, however, have never called the defender Mrs Roger to account for her intromissions, and refuse to do it although repeatedly called on by pursuer to do so. As already explained, the trustees are the defender Mrs Roger herself, her son Daniel M'Ewan Roger, who lives in family with her, and their friend the said James Gray, who is largely indebted to her, and they were nominated by the foresaid codicil, impetrated fraudulently from the deceased by Mrs Roger simply for the purpose of evading an action of count and reckoning for her intromissions which she knew the trustees would at her instigation refuse to raise. The trustees

would not raise an action against the defender though desired to do. In these circumstances the present action has been rendered necessary."

The defender averred—"Explained that shortly after her husband's death Mrs Roger received in gift from her father-in-law the sum of £775, 8s. 6d., then at his credit in the Dundee Savings Bank. This money had been originally intended by the deceased, and was promised by him, as a gift to William Roger junior; but as the latter had not uplifted the money when he died, the truster shortly after his son's death handed over the bank-book containing the above-mentioned sum to the defender, and requested her to uplift the money and apply it to her own uses. The said sum was presented by the deceased to the defender to be her absolute property."

The pursuer pleaded—"(1) The defender Mrs Helen Greig Heath or Roger having intromitted with the estate of the late William Roger senior, she is bound to hold count and reckoning, and to make payment, in terms of the first conclusion of the summons. (2) Failing count and reckoning, the defender Mrs Roger ought to be decreed to make payment of the sum of £1500 as alternatively concluded for."

The defenders pleaded—"(1) No title to sue."

Upon 27th November 1889 the Lord Ordinary sustained the defender's first plea-in-law and dismissed the action.

"*Opinion.*—This is an action by a beneficiary under a trust-settlement, calling upon a debtor to the trust (if a debtor at all) to count and reckon for her intromissions with the trust-estate, and to pay the balance found due to the trustees on that estate. I think the pursuer has no title to sue such an action. See the case of *Henderson*, 16 R. 341, and cases there referred to. As pointed out in these cases, the pursuer should call upon the trustees to raise an action against Mrs Roger, and if they decline, to obtain the use of their names as pursuers by finding caution to keep them free of all expenses of process."

The pursuer reclaimed.

At advising—

LORD LEE—The Lord Ordinary has sustained the first plea-in-law for the defenders, which is, that the pursuer has no title to sue, and the ground upon which he has done so is that the pursuer's proper course was to call upon the trustees to raise action against Mrs Roger, or if they should decline to do so to obtain the use of their names. But the allegation is that the trustees, of whom the defender Mrs Roger is the chief, refuse to do this, and are acting in concert with her to enable her to evade a claim for moneys admittedly belonging to the deceased's estate, unless she proves a donation *inter vivos*. The trustees are called as defenders.

The operative conclusions of the summons are—not that Mrs Roger should account and pay to the pursuer, but that she should account and pay to the trustees, and the grounds upon which she justifies

the action are that a large part of the deceased truster's estate at the date of his death was in the hands of Mrs Roger, the leading trustee, and that she refuses to give, and the trustees refuse to require from her, any account of her intromissions. Now, the answer made in the defence by Mrs Roger is that her intromissions with deceased's estate prior to his death were not so large as alleged, and that the sum of about £800 specially referred to "was received by her in gift from her father-in-law" (the deceased truster), "and was presented to her as her own absolute property." The trustees give no reason for not calling upon her to account.

Now, such a case is not at all similar to that of *Rae v. Meek*, where the pursuers had no present right and interest as beneficiaries under the trust, but only a contingent interest in the event of their surviving the spouses who were both alive.

Neither does it seem to be ruled by *Henderson v. Robb*, where the estate was under the charge of the trustee in a *cessio*, who was not called as a defender. This was particularly pointed out in the opinion of the Lord President.

The case is more like that of *Teulon v. Seaton*, May 27, 1885, 12 R. 971, but the plea of no title to sue was not sustained in that case. The only question was as to the pursuer's liability to find caution for expenses, being a married woman without any separate estate, and suing in her own name alone.

In the present case I fail to see any ground of objection to the pursuer's title, assuming that she proves her allegation that the other trustees (Mrs Roger's son Daniel and her friend James Gray) are acting in concert with her for the purpose of enabling her to evade this claim. The action is not an action by a creditor of a trust against a debtor to the trust. It is directed also against the trustees, and upon very special grounds. It is not said that the trustees ever offered the use of their names on receiving caution for expenses. No reason whatever has been given either for disputing the right and interest of the pursuers to have the question of Mrs Rogers liability to the trust tried, or for not trying it in the present action.

I am therefore of opinion that the interlocutor of the Lord Ordinary should be recalled and the cause remitted to him to proceed.

LORD RUTHERFURD CLARK—I am disposed to think that the judgment of the Lord Ordinary is right. But I am sorry to think that the judgment is to be the other way.

LORD YOUNG—I agree with Lord Lee. The real question is whether or not the pursuer's mother received a sum of £775 as a gift from her father, the pursuer's grandfather. That must be tried. I see no objection to it being tried in this process. If it is proved that the gift was made, the case will be at an end. If not, so much more must be accounted for. The pur-

suer's interest in the accounting is small in any view, but she is entitled to have the question tried, and this process is, I think, a fitting one to try it. To hold otherwise would only lead to more litigation.

The Court recalled the Lord Ordinary's interlocutor, and remitted to him to proceed.

Counsel for the Reclaimer—G. Watt. Agent—William Officer, S.S.C.

Counsel for the Respondent—Sir C. Pearson—Guthrie. Agents—Henderson & Clark, W.S.

Friday, July 18.

FIRST DIVISION.

[Lord Kincairney, Ordinary.]

GRAY v. THE SOCIETY FOR PREVENTION OF CRUELTY TO ANIMALS.

Reparation—Slander—Issue—Innuendo—Relevancy—Privilege.

A prosecution having been instituted against a stable manager for cruelty to a horse, the charge was found not proven. The stable manager thereafter wrote letters to the Society for the Prevention of Cruelty to Animals requesting them, as the prosecution, though nominally at the instance of the Fiscal, had really been at their instance, to pay the expenses of his defence, and representing that the charge had been unfounded and only brought through the excessive zeal of two officers of the society, and that it had ignominiously failed. On the society refusing to pay the expenses in question the stable manager sent these letters to the newspapers. The society shortly after sent a letter to these newspapers justifying their action and making the following statements—The horse was being worked with two large sores under its collar. On its state being pointed out to the driver it was replaced by another; the stable manager had admitted his responsibility for sending it out as he had been warned for a similar offence not long before. It was thought necessary to report the matter to the Fiscal; the Fiscal had decided to prosecute, and the Magistrate had "found the case 'not proven,' in the circumstances a very different verdict from 'not guilty;'" the coachman admitted in Court to the Fiscal that it was cruel to have the animal in yoke in the state in which it was found.

In an action of damages for slander by the stable manager against the society the pursuer did not deny the truth of the statements of fact contained in the letter, but averred that the defenders, by suppressing all illusion to the defence and to the testimony given by the pursuer's witnesses, while pretending to give the facts of the case,

had given a narrative false in all the particulars applicable to the conduct of the pursuer, and designed to create, and which had created, a false representation of the facts.

Held that in the absence of any denial on record of the truth of the statements of fact in the letter, the pursuer's averments were not relevant, and action dismissed.

Opinion (per Lord Shand) that if there had been a relevant ground of action the defenders were in a privileged position, and the pursuer would have had to put malice in issue.

Process—Amendment.

Circumstances in which an amendment was allowed to be made upon record after the case had been taken to avizandum.

On 12th October 1889 two of the officers of the Scottish Society for the Prevention of Cruelty to Animals observed that one of the horses attached to a four-in-hand coach on the Edinburgh and Forth Bridge service belonging to Messrs John Croall & Sons, coach proprietors, had two sores on its neck under the collar and drew the driver's attention to the matter, with the result that the horse was replaced by another. Information as to the case was given to the Procurator-Fiscal, and a complaint was thereafter made against Andrew Gray, stable manager at the stables of Messrs John Croall & Sons, Easter Road, Edinburgh. The case was conducted by the Fiscal in the Burgh Court on 29th October, and a verdict of "not proven" was returned by the Magistrate.

On 30th October Mr Peter Morison, Gray's agent, wrote to Mr Langwill, the secretary of the Scottish Society for the Prevention of Cruelty to Animals, the following letter:—Dear Sir,—I am requested by Mr Andrew Gray, residing at Drum Stables, Easter Road, to write you regarding the complaint of cruelty to a horse made against him, and tried before the Magistrates yesterday, when the charge completely failed. You are aware that in reality the complaint was at the instance of your society, and while my client is aware that personally he cannot prevent the society from instigating the Public Prosecutor to take up and adopt such prosecutions, that being a matter between the Procurator-Fiscal and those who pay him; yet, as he is merely a working man, not only is he put to great disadvantage by having the resources of the Public Prosecutor directed against him, but he is put to this additional, and what I cannot help thinking unfair, disadvantage, viz., that he cannot get his expenses against the Public Prosecutor in a case where the latter ignominiously failed to establish the charge, as he did in this case. My client therefore trusts that when it is represented to them that he is merely a working man with a small weekly wage, that he is unable to bear the expenses of defending himself against an action brought in reality by your society, though sheltering itself behind the Procurator-Fiscal, your society