

(pursuer) of all compensation which might be found due to her in respect of damage to her property, including compensation for temporary removal therefrom, should that be found necessary by the referee after mentioned by reason of the appellants' (defenders) operations, past as well as future, as the same may be assessed by a referee to be appointed by the Court."

Counsel for the pursuer having expressed their acquiescence in this proposal, the Court recalled the interim interdict and appointed Mr D. A. Stevenson, C.E., referee.

Counsel for the Pursuer and Respondent—M'Kechnie—Clyde. Agents—Carment, Wedderburn, & Watson, W.S.

Counsel for the Defenders and Appellants—H. Johnston—Dundas. Agents—Dundas & Wilson, C.S.

Saturday, July 15.

## SECOND DIVISION.

[Lord Kincairney, Ordinary.]

### BLYTH v. PURDOM & SON.

*Title to Sue—Process—Competency of Action Brought by Deceased's Children and Cautioner of Deceased's Executor-Dative against Persons who had Agreed to Relieve Cautioner.*

In 1877 A died intestate leaving pupil children, B the brother of A was confirmed his executor-dative, and C became B's cautioner. By bond of relief D bound himself to free and relieve C of the whole obligations undertaken by him under the said bond of caution and of all claims under the same in any judicatory, and to account for the whole sums of money contained therein to anyone having interest, and to make payment of the same so as thereby to defend and free C from all suits and actions competent against him as cautioner.

In 1892, after B's death, A's children and C raised an action against D for a sum of money, in which they averred B at the date of his death was indebted to the executry estate. *Held (dub. Lord Rutherford Clark)* that the pursuers had a good title to sue, and that the action was competent.

In November 1892, James Blyth and George Gullan Blyth, the only children and next-of-kin of the deceased Robert Blyth, and Marcus J. Brown, S.S.C., Edinburgh, raised an action against Thomas Purdom & Son, Solicitors in Hawick, as the said firm existed at 22nd December 1892, and Robert Purdom, Solicitor in Hawick, as a partner of said firm and as an individual, and against the trustees of the deceased Thomas Purdom, the only other partner of the said firm, and also against James Blyth, only child of the deceased Walter Blyth, Whitriggs, Hawick, and his tutors and curators, if he any had, to

have it declared that the said deceased Walter Blyth, as executor of the also deceased Robert Blyth, was at the date of his death due and indebted to the executry estate of the said Robert Blyth in the sum of £93, 4s., and that the said sum had never since his death been paid, but was still due and resting owing; and to decern the defenders Thomas Purdom & Son, and Robert Purdom, as a partner of the said firm and as an individual, and Thomas Purdom's trustees, to make payment to the pursuers of the sum of £93, 4s. sterling, with interest thereon at the rate of five per centum per annum from 23rd day of December 1892 till payment.

The pursuer averred—“(Cond. 1) The late Robert Blyth, draper in Musselburgh, died there intestate on or about 28th November 1877, and Walter Blyth, sometime farmer, Ettrickhall, near Selkirk, thereafter at Whitriggs, near Hawick, since deceased, was, upon an application at his instance, decerned executor-dative. Marcus John Brown, S.S.C., Edinburgh, became cautioner for the intromissions of the said Walter Blyth, as executor conform to bond of caution enacted in the Commissary Court Books at Edinburgh, to the amount of £597, 15s. 6d. (Cond. 2) Thereafter the said Walter Blyth entered upon the possession and management of the said estates. He instructed his then law-agents to attend to the realisation thereof, and to the payment of the claims against the estate. They did so, and after satisfying all the debts and paying the administration expenses, there remained in their hands a balance of £93, 4s. (Cond. 3) In or about the month of December 1882, being five years after the death of the said Robert Blyth, the said Walter Blyth applied to his said law-agents for payment of the said balance, with the view, as he stated, of applying the same towards payment of a bill for £300 or thereby which he and a Mr Inglis had signed, and which was then current or due and payable, and had been discounted by or through Messrs Thomas Purdom & Son, solicitors and bankers in Hawick. Upon Mr Brown making inquiries he found, and it is now averred, that the deceased Robert Blyth was not a party to, and was not liable under said bill. Having satisfied himself that neither the said bill nor any part thereof formed a claim against the estate of the said deceased Robert Blyth, his firm, as law-agents in the executry, and he as cautioner foresaid, objected to the payment out of the executry funds, and to the handing over of the foresaid balance with the view of its being applied in the manner proposed. (Cond. 4) The said Walter Blyth consulted the said Thomas Purdom & Son, who on his behalf wrote to Mr Brown demanding the money, and subsequently offered in exchange for payment to grant in favour of Mr Brown a bond of relief in respect of the obligations undertaken by him under the said bond of caution. This was agreed to, and accordingly the said firm of Thomas Purdom & Son as a firm, and Thomas Purdom and Robert Purdom, the individual

partners of said firm, as such partners and as individuals, in exchange for payment to them of the said balance, bound themselves jointly and severally to free and relieve Mr Brown of the whole obligations undertaken by him under the said bond of caution, and to warrant, free, relieve, harmless and scathless keep him of the same, and of the whole sums of money—principal, interest, and penalties—contained therein, and for that purpose to appear in the Commissary Court or any other judicatory when called upon, and account for the whole sums to anyone having interest, and make payment of the same, so as thereby to defend and free Mr Brown from all suits and actions competent against him as cautioner. (Cond. 5) The said balance of £93, 4s. was, in exchange for the said deed, thereupon paid over to the said Thomas Purdom & Son, who, it is believed, paid over the amount to themselves towards the sum contained in the said bill granted by the said Walter Blyth and William Inglis. If it was so applied by them it was wrongfully applied. The pursuers believe and aver that no part of the said bill formed a charge against the estate of the said Robert Blyth, and this was at the time well known to the said Walter Blyth and Thomas Purdom & Son, and the payment, if made, was made to benefit themselves. (Cond. 6) The pursuers are the only children and next-of-kin of the said Robert Blyth, and as such are entitled to receive between them the free balance of the said executry estate. Upon the pursuer, the said James Blyth, attaining majority in the month of September 1892, he called upon Mr Brown, as cautioner foresaid, to account for and make payment of the foresaid sum or balance of £93, 4s. Mr Brown thereupon called upon the defenders, the said Thomas Purdom & Son, to implement their obligations under the said bond of relief, and to hand over or account for the said sum, with interest, to the pursuers, or to free and relieve Mr Brown from the action threatened by the pursuer, the said James Blyth, but as they decline so to do the present action has become necessary. (Cond. 7) The said Thomas Purdom is dead, and he is now represented by his trustees, who are called as defenders. The said Walter Blyth died intestate on or about 12th November 1891, and he is now represented by James Blyth, his only child, who is also called as a defender."

The pursuers pleaded—"The said sum of £93, 4s. being due by Robert Blyth's executor, and the pursuers having demanded payment thereof from the said executor's cautioner, and the defenders, or those whom they represent, having agreed to relieve the said cautioner thereof, and to account for the same to all having interest, the pursuers are entitled to decree in terms of the conclusions of the summons, with expenses."

The defenders, with the exception of James Blyth, lodged defences, and pleaded, *inter alia*—" (1) No title to sue. (3) The action is incompetent and irrelevant."

On 10th June 1893 the Lord Ordinary

(KINCAIRNEY) repelled the first and third pleas for the defenders.

"*Note*.— . . . The only points which can at present be disposed of are those as to title and as to the competency of the action. These pleas are technical and dilatory in a strict sense, and are put forward to avoid the determination of the question raised on the record in a litigation between the only persons who have any real interest in it.

"These pleas are, however, serious enough. They come to this, that inasmuch as on the showing of James and George Blyth, the pursuers, their debtor was Walter Blyth, and the defenders Purdom & Son were Walter Blyth's debtors, this action is a suit by a party against his debtor's debtor, which has been disallowed in several cases. The defenders referred in particular to *Rae v. Meek*, July 19, 1888, 15 R. 1033, 1050-51, and *Henderson v. Robb*, June 18, 1889, 16 R. 341. The case of *Hinton v. Connell*, July 6, 1883, 10 R. 1110, is to the same effect.

"Admitting that the rule that a party cannot sue his debtor's debtor is of general application, yet it does not appear to me to be a universal rule, or to amount to an affirmation of the absolute incompetency of an action against a debtor's debtor. Such an action was sustained (in special circumstances, no doubt) in *Watt v. Rogers*, 18th July 1890, 17 R. 1201, and also in *Teulon v. Seaton*, 27th May 1885, 12 R. 971; and Lord Herschell in his judgment in the House of Lords in *Rae v. Meek*, while negating the title in that case of alleged beneficiaries under a trust to sue an action of damages against the law-agents of the trustees, observed—"There may be cases where, if trustees fail to call to account those who are under liability in respect of acts injurious to the trust estate, the beneficiaries may compel them to do so, or even enforce the right themselves."

"It appears to me, that assuming the rule to be applicable in this case, it is a case in which, if the rule be not universal and absolute, it ought not to be enforced. I do not question that the rule rests on sound principles, and is, as explained by Lord Shand in *Rae v. Meek*, very often more than a technical rule; yet I think that in this case it is only technical, and might, if enforced, cause injustice. Supposing it were quite clear that this sum of £93, 4s. could have been reclaimed from Purdom & Son by Walter Blyth—which, of course, I do not say it is—but if that were clear, it would also be clear that the pursuers are entitled to it, and I do not clearly see how they could enforce their right except by a direct claim like this—at least, I do not think they should be compelled to adopt a much more expensive and circuitous method. For it is not clear that there is anyone else who has at present a title to sue Purdom & Son. The executor is dead. The record is defective in so far as it gives no information about James Blyth, except that he is Walter Blyth's only child. But it is not said that he has been confirmed as his father's executor, and if, as I rather

gathered from what was said at debate, he has not been appointed executor, then he has at present no title to sue Purdom & Son, and is under no obligation to make up a title which would enable him to sue them. I think that in the circumstances it would be unreasonable to require the pursuers to endeavour to induce James Blyth, or his tutors or curators, to make up a title in his name as executor of his father, or failing that endeavour, to have a judicial factor appointed on Walter Blyth's estate, in order that he might concur with the pursuers in suing Purdom & Son.

"Further, it is by no means clear that the rule in question applies to this case at all. The parties are in a peculiar position. There is here no trust, only an executry, the executor being dead. It appears to me that the defenders may be represented as debtors, not of Walter Blyth as an individual, but of Walter Blyth as executor; that is to say, as indebted to the estate of Robert Blyth. The pursuers are not the creditors of Robert Blyth, but his representatives. Had they been confirmed as his executors, as I think they should have been, there would apparently have been no doubt about their title to sue, or about the competency of the action. In substance, this is a claim by Robert Blyth's representatives against his alleged debtors, and I am therefore not satisfied that it is a case to which the rule in question applies.

"I doubted at one time whether this case might not be assimilated to a case in which trust beneficiaries seek to follow trust estate into the hands of third parties, but I think that as it is not said that this trust estate is capable of identification, the case cannot safely be determined on that ground.

"On the whole, I have come to the conclusion that the plea to title and the plea against the competency of the action should be repelled.

"The action is also sued by Marcus J. Brown, who was cautioner in the executry, and who alleges that the other pursuers have called on him to pay his debt. He sues in virtue of a bond granted by Purdom & Son to him, by which they bound themselves, *inter alia*, to relieve him of his bond of caution, and to that end to pay the whole sums covered by it to anyone having right thereto, and what is concluded for is just what Purdom & Son bound themselves to do. But the defenders maintain that Brown is not in a position to sue, because it has not been established that any debt was due by Walter Blyth to James and George Blyth, or that if due, it could not be recovered from his estate, or that if both these points were established, he (Brown) is liable under his bond of caution. There may be room for question on these points, but I do not think it necessary to determine whether Mr Brown could have sued this action alone, and I do not mean to determine that by repelling the defenders' plea that the pursuers have no title to sue. If the other pursuers have a title to sue, then the instance of Mr Brown is of no consequence."

The defenders reclaimed, and argued—

That no exception should be made in this case to the general rule that a party could not sue his debtor's debtor. The right course for the pursuer Blyth to take was to sue either Walter Blyth's representatives or his cautioner Brown. If in such an action Brown, the cautioner, was found bound to pay any sum in his capacity of cautioner, he then would be entitled to demand payment from the defenders. The present action should be dismissed.

Argued for pursuers—The Lord Ordinary's judgment was right and his reasoning sound. All parties interested were present in this action, and under the bond Purdom & Son bound themselves to appear in Court and account for the sums due to anyone having interest. Further authorities—*Knutchball v. Hallett*, February 11, 1880, 13 L.R. Ch. D. 696; *Cunningham v. Montgomerie*, July 19, 1879, 6 R. 1333.

At advising—

LORD TRAYNER—The Lord Ordinary by the interlocutor reclaimed against has repelled two preliminary pleas urged by the defender—(1) that the pursuers have no title to sue, and (2) that the action is incompetent. The second of these pleas, the more important in my opinion of the two, undoubtedly gives rise to some difficulty. It arises thus—[*His Lordship stated the circumstances averred by the pursuers*]. In these circumstances it is urged by the defenders that this action is incompetent, as being one directed by the pursuers against their debtor's debtor; and that the pursuers can only sue the representatives of the executor (who is now dead) and his cautioner, leaving the latter to operate his relief against the defenders under the bond I have referred to. There is no doubt that the course thus pointed out would have been the simplest, and according to our practice the usual course for the pursuers to follow. But the question is, is the course they have adopted incompetent? and in the special circumstances of this case I have come to be of opinion that it is not. The principal pursuers—I mean the children of Robert Blyth—could have sued Mr Brown, the cautioner, under his bond of caution, for the amount of their father's executry which had come into the executor's hands. They did not require to call the executor's representatives in such an action; they had a direct claim against the cautioner, he not being entitled to the benefit of discussion. On such an action being brought, Mr Brown would have been entitled to raise an action of relief against the defenders; and if these two actions were conjoined—obviously a convenient course to follow—the present defenders would have been liable ultimately in any sum which might have been discerned for. The very same result is reached by the present action, for Robert Blyth's children and Mr Brown have concurred in suing the defenders to make payment of funds said to be part of Robert Blyth's executry. For this they would require to answer in any action brought against them

by Mr Brown, and the only thing that has not been done is, that Robert Blyth's children have not raised a separate action against Brown before Brown raised his action against the defenders. I think this circuity of action is avoided by holding the present action competent, and circuity of action is to be avoided where it can. The defenders suffer no harm by the course adopted. They would either have required to defend any action brought against Brown, or pay him the expenses he was put to in defending himself. The amount of the principal debt sought to be constituted against them is the same whatever course is adopted to enforce payment of it. If the sum sued for is due to Blyth's children, the defenders are the ultimate debtors therein; and the concurrence of Brown—who may be regarded as the primary debtor in the present action—makes the case really a demand on the part of the creditors against the ultimate debtors.

But I confess I am a good deal moved to affirm the Lord Ordinary's interlocutor on this question of competency by the terms of the bond granted by the defenders to Mr Brown. By that bond (which was granted in respect of the payment to them of the very sum for which they are now sought to be made liable), the defenders undertook to appear in any court when called upon, and account for the whole executry estate "to anyone having interest" so as to free the cautioner Mr Brown from any liability thereanent. In the face of that undertaking I do not well see how they can maintain their present plea. They have been called upon by Mr Brown in this action to answer to him and Robert Blyth's representatives for part of the executry funds, in order that Mr Brown may be freed from liability therefor. They are therefore only being called on to fulfil their undertaking by persons who have a direct right to call them to account for Robert Blyth's executry funds. I have no doubt of the pursuers' title to sue. Brown has an undoubted title to sue to the effect of relieving himself of the claims made by Blyth's children, which he must meet if the defenders do not do so; and Blyth's children have an interest and title to sue for the recovery of that estate, which, if it exists at all, is now due to them.

LORD RUTHERFURD CLARK—I have had great difficulty in this case. If the action is competent it is so only by reason of the terms of the bond. I see no other reason for its being held competent.

The LORD JUSTICE-CLERK concurred.

LORD YOUNG was absent.

The Court adhered.

Counsel for Pursuers—Lees—A. S. D. Thomson. Agent—Marcus J. Brown, S.S.C.

Counsel for Defenders—Cook. Agents—Fife, Ireland, & Dangerfield, S.S.C.

Saturday, July 15.

FIRST DIVISION.

WILLISON v. PETHERBRIDGE.

Process—Appeal for Jury Trial—Judicature Act 1825 (6 Geo. IV. c. 120), sec. 40—Reparation—Dismissal of Apprentice.

Held that an apprentice who had raised an action against his master in the Sheriff Court for £50 for alleged wrongous dismissal in breach of his indenture, and had afterwards appealed to the Court of Session for jury trial under the 40th section of the Judicature Act, was entitled to have his case tried by a jury, no special cause to the contrary having been shown.

Upon 28th October 1892, John Willison, Broughty Ferry, was by indenture apprenticed for five years to James Petherbridge, dental surgeon, Dundee, but upon 14th February 1893 was dismissed for alleged failure to fulfil the duties and obligations incumbent on him under his indenture.

In March 1893 he brought an action in the Sheriff Court at Dundee against Mr Petherbridge for £50 as damages for illegal dismissal in breach of his indenture, that being the penalty to be paid by either party failing to fulfil the contract. In May 1893 he appealed to the Court of Session for jury trial, and submitted an issue in ordinary form.

The defender argued that jury trial should not be granted (1) because of the trifling nature of the claim, and because the witnesses were all in or near Dundee—*Bethune &c., v. Denham*, January 6, 1886, 13 R. 882, and case of *Mitchell v. Sutherland* there referred to; *Nicol v. Picken*, January 24, 1893, 20 R. 288; (2) because this was not merely a case for assessing damages, but involved the construction of a legal document.

Argued for appellant—(1) The sum sued for was above that fixed by statute, which was £40. The claim was not a trifling one, for it implied vindication of character. He was entitled to jury trial unless some special reason could be adduced to the contrary, which had not been done—*Hume v. Young Trotter & Company*, January 19, 1875, 2 R. 338; *Mitchell v. Urquhart*, February 9, 1884, 11 R. 553; *Crabb v. Fraser*, March 8, 1892, 19 R. 580; (2) there was nothing unusual in the terms of the indenture involving complicated questions of law. It was a case very suitable for a jury.—*Stewart v. Crichton*, March 15, 1847, 9 D. 1042.

At advising—

LORD PRESIDENT—I think that this case should go to a jury. It is an action of damages, and the fact that the sum claimed is only £50 is not of itself sufficient cause for keeping it away from a jury. No doubt it involves construction of a contract, but a contract of a very simple nature. There is nothing unusual in the terms of the instrument constituting the relation of master and apprentice. The facts are of a