

The pursuers moved to amend their petition by striking "entering or" out of the prayer.

At advising—

LORD YOUNG—I think the judgment of the Sheriff-Substitute is right, and it does not occur to me that the circumstances of the case require me, in expressing my opinion, to enter into any details whatever. There is no doubt that the ground, which is a road leading to the houses of workmen in the employment of Merry & Cuninghame, belongs to them as tenants of the ground leased by them, and that the exclusive use of the road is with them, and with those to whom they may be pleased to give it during the subsistence of their lease. The question really presented to us is, whether the picketers on the occasions in question were entitled to be on the road for the purpose of advising or persuading the workmen in the pursuers' employment to abstain or to continue to abstain from work. We have not here any question about the right to use this road by those who in the ordinary course of human affairs have occasion to go to the workmen's houses, and whose going there is in the interest of the workmen themselves. Tradespeople, shopkeepers, and their emissaries, carrying necessary provisions, and a variety of other people whom the tenants may desire to call on them, are entitled to use this road, or rather the tenants are entitled to insist that such uses of the road shall be allowed. But we have no concern with any uses of that kind here; there is no complaint by the tenants that such people whom they desired to see at their houses on suitable occasions are not permitted the use of the road. We are only dealing with picketers who maintain a right to go there in numbers for the purpose of persuading in any manner they please, if they do not resort to actual violence, the pursuers' workmen from going to their works. I am of opinion that that contention of right on their part cannot be sustained. I take the same view as the Sheriff-Substitute, that the assertion of a right by the defenders to make such a use as they are proved to have made in the past, and the making of which has led to this action being brought, must be negatived, and interdict granted accordingly in respect of that negative.

I have quite in view the proposal that the interdict should be restricted to trespass, and that the words "entering or" should be struck out. The interdict as granted will thus not interfere with the use of the road by people legitimately there for the purposes I have already indicated.

I wish to enter a protest against the practice, which seems to have become common in sheriff courts, and which has been followed here, of allowing the shorthand writer to take down the evidence at large without restraint. I think this course is irregular. The law was stated correctly by Mr Dove Wilson in his Sheriff Court Practice, 176—"Evidence, however, is now usually taken in shorthand, which is a great improvement as regards speed, economy,

and accuracy." . . . "The Sheriff dictates to the shorthand writer the evidence which he is to record." . . . "The practice of allowing the shorthand writer to take down the evidence without its being dictated to him is against the statute, and is apt to make the proof unnecessarily prolix." That is a correct statement of the law, and to do otherwise is contrary to the Act of Parliament.

LORD RUTHERFURD CLARK, LORD TRAYNER, and the LORD JUSTICE-CLERK concurred.

The Court pronounced the following interlocutor:—

"Open up the record, allow the prayer of the petition to be amended, and the amendments having been made, of new close the record: Find in fact (1) that the roads in question are private roads; (2) that the pursuers are tenants in possession of such roads; and (3) that the defenders . . . have on various occasions trespassed on the said roads, or one or other of them, and on the lands of Bardyke and Spittalhill, and on the lands of Spittal and Mavishill adjacent thereto, and maintain a right to do so: Dismiss the appeal: Affirm the interlocutor appealed against: Of new continue the interim interdict formerly granted, . . . and continue the same as long as the pursuers continue to be in the occupation of the subjects in respect of which the interim interdict was granted."

Counsel for Pursuers—C. S. Dickson.
 Agents—Forrester & Davidson, W.S.

Counsel for Defenders—Dundas—Orr.
 Agents—George Inglis & Orr, S.S.C.

Wednesday, December 5.

SECOND DIVISION.

[Lord Kyllachy, Ordinary.

MACNAB v. MACNAB'S EXECUTOR.

Succession—Legitim—Representation—Intestate Moveable Succession (Scotland) Act 1855 (18 and 19 Vict. c. 23).

A testator died in 1867 survived by three sons, Alexander, James, and John. James died in 1884 survived by five children. John died intestate and childless in 1891, without having elected between his legitim and the provisions made to him in his father's settlement. Thereafter one of the children of James brought an action against Alexander, who had been appointed John's executor-dative, for a share of the legitim which the latter might have claimed from his father's estate. The defender, who had the residuary interest in that estate, objected that James had barred himself by his actings from making any claim in respect of said legitim, and that the pursuer, as representing her father under the Intestate Succession

Act of 1855, was equally barred from making such a claim.

Held (aff. judgment of Lord Kyllachy) (1) that the pursuer claimed in her own right, and therefore that her claim was not barred by anything that her father might have done; and (2) that, as John's right of legitim was of much greater value than the provisions made to him in his father's settlement, the defender, as his executor, was bound to claim the former.

James Macnab, senior, died on 22nd February 1867 predeceased by his wife, but survived by three sons—Alexander, James, and John, and by two daughters of a deceased son, Daniel Macnab. He left a trust-disposition and settlement dated April 5th 1860, and two codicils, whereby he nominated five persons to be his trustees and executors. Two only of these accepted office, his sons Alexander and James Macnab, junior. The testator, *inter alia*, directed his trustees and executors to pay to his son John, or to expend on his behoof, a free yearly alimentary annuity of £52 sterling during his life. He however, expressly provided and declared that it should be optional to and in the power of his trustees and executors, at any time within seven years from the date of his decease, on being satisfied with his conduct, or on its appearing to be for his benefit, to pay to John Macnab in place of the annuity, which should thereupon cease, a capital sum of £1500, or to put aside a capital sum to meet the annuity which was declared to be strictly alimentary and not assignable by John Macnab. The residue of the trust-estate was to be paid over to the trust-estate's two sons Alexander and James, equally between them, and to their respective heirs or assignees.

John Macnab, who was in Australia at the date of his father's death, never returned to Scotland.

In 1869 the two brothers James and Alexander entered into an arrangement contained in several deeds, by which the partnership between them was dissolved, and Alexander paid to James £4860 in full of his share of the copartnery. James Macnab also resigned the office of trustee on his father's estate, and granted an assignation of all his interest, present, future, and contingent, in his father's estate to his brother Alexander. Of the same date as the other deeds, Alexander Macnab granted a personal bond, wherein, with reference to the bequest of £1500 to John Macnab in his father's settlement, he bound himself, and his heirs, executors, and representatives, that if John Macnab should not within three years from the date of the bond appear to make any claim on his father's estate, or if it should not within that period become known that he was alive and in a position to make such claim, then and in that event, he or his foresaids should pay to James Macnab, his heirs, executors, or assignees the sum of £750, being one-half of the sum of £1500, but without interest thereon. There were other stipulations in the bond, but the sum of £750

was never paid, because a letter was received from John Macnab in 1870. James Macnab died on May 14th 1884 survived by five children. He left no estate, and no one assumed the position of his executor.

John Macnab never received any part of the annuity left to him by his father, and he never claimed any share of his father's estate. He was last met with in the Australian bush in October 1884, and nothing was afterwards heard of him. On 26th November 1891 Mary Marjory Macnab, residing in Glasgow, daughter of the deceased James Macnab, junior, as one of the parties entitled to participate in the succession to the moveable estate of John Macnab, according to the law of Scotland, presented a petition to the Court of Session under the Presumption of Life (Scotland) Act 1891, to fix the date of John's death. Under this petition the Lord Ordinary found that John Macnab should be presumed to have died on 30th September 1891.

Upon 30th September 1891 the persons entitled to share in John's Macnab's moveable estate were his brother Alexander, the five children of his deceased brother James, and one child of his deceased brother Daniel.

In 1893 Alexander Macnab was appointed as executor-dative of his brother John.

In October 1893 Mary Marjory Macnab, one of James Macnab's children, brought an action against Alexander Macnab as executor-dative of John Macnab, and also as sole surviving trustee under his father's trust-disposition and settlement, to have it declared (1) that John Macnab had at the date of his father's death a right to legitim out of his moveable estate, and that he had never renounced or discharged this right, and that it had passed to his personal representatives; . . . (3) that the defender as his executor was in ingathering, realising, and administering John Macnab's estate a trustee for the whole parties entitled to participate in it as heirs *in mobilibus* of John Macnab, and that he was not entitled "to avail himself to his own private advantage of any right of election inherent in him as such executor by electing to discharge the foresaid claim, which was competent to the said deceased John Macnab for the legitim or bairns' part due to him from his late father's estate by the said Alexander Macnab as trustee foresaid, by accepting in satisfaction thereof any conventional provision or otherwise to the prejudice of the pursuer and the other heirs in moveables of the said John Macnab, but that he is as executor foresaid bound to ingather, realise, and administer all estate of the said John Macnab, including all debts due to him as may be most for the advantage of the whole body of such heirs in moveables." There were also conclusions for accounting and payment. The sum claimed was £606, 4s. 10d. being the fifteenth part of £9093, 13s. 1d., which was averred to be the amount of legitim due to John Macnab as a debt from his father's estate.

The defender pleaded—“(2) The said John

Macnab not having elected to take legitim, and to reject his conventional provisions under his father's settlement, the pursuer is not now entitled to make the claim. (3) The defender as executor of the said John Macnab was not bound to claim legitim. (4) The pursuer's father having taken his share of the residue of the late James Macnab senior's estate, and the pursuer having participated therein, is barred from insisting on legitim being claimed by the defender as John's executor, until she pay back the share of the estate which her father would have required to restore had the said claim to legitim been made in John's lifetime. (6) In respect of the actings of her father, the pursuer is barred from maintaining her claim that the defender should, as John Macnab's executor, claim legitim."

The Intestate Moveable Succession Act 1855 (18 and 19 Vict. cap. 23) provides—"Section 1, In all cases of intestate moveable succession in Scotland accruing after the passing of this Act, where any person who had he survived the intestate would have been among his next-of-kin shall have predeceased such intestate, the lawful child or children of such person so predeceasing shall come in the place of such person . . . and shall respectively have right to the share of the moveable estate of the intestate to which the parent of such child if he had survived the intestate would have been entitled."

Upon 25th October 1894 the Lord Ordinary (KYLACHY) pronounced this interlocutor—"Finds, decerns, and declares in terms of the first and third conclusions of the summons; and with respect to the conclusion for accounting, appoints the defender, within three weeks, to lodge an account of the share of legitim due to the pursuer as one of the heirs *in mobilibus* of the late John Macnab: Finds the pursuer entitled to expenses, allows an account to be lodged, and remits the same to the Auditor to tax and report; grants leave to reclaim.

"*Opinion.*—The late John Macnab, who died in 1891, had right to claim legitim from the estate of his father the late James Macnab, senior, who died in 1867. He had also the option of claiming an alimentary annuity under his father's settlement. But the legitim was plainly the more valuable right, and at the time of his death he had done nothing to discharge it, unless such discharge is to be inferred from mere silence—a point which I shall presently consider.

"Assuming that at the date of his death John Macnab had not discharged his legitim, the claim of course passed to his personal representatives, and formed part of his executry; and, as he died intestate, his personal representatives are his heirs *in mobilibus* according to the Scotch law of intestate succession. He is presumed to have died in Australia, having disappeared in that country so far back as 1884, but there is no suggestion on either side that he was not a domiciled Scotchman,

"Now, his heirs *in mobilibus* were (1) the defender, his brother, Alexander Macnab; and (2) the pursuer and her four brothers and sisters, who are children of a deceased brother James Macnab, jr., and who succeed as representing their father under the Intestacy Act of 1855. The defender became executor as being the sole next-of-kin, but of course he is as such executor bound to ingather and administer the estate as trustee for the whole heirs *in mobilibus*. His duty is, in short, the usual duty of a trustee administering on behalf of beneficiaries.

"Now, that being the situation, the defender, as executor of John Macnab, having thus a claim of debt against the estate of James Macnab, senior, it appears that he declines to make the claim, and the present action is brought by the present pursuer, as one of the heirs *in mobilibus*, in effect to have it declared that he is bound to execute his trust by making and enforcing the claim.

"The case is, in one view, complicated, but is really perhaps simplified by the circumstance that the defender is himself the representative of the estate against which the legitim is claimed—being both sole trustee on the estate of his father James Macnab, senior, and also, as matters stand, having the sole residuary interest of that estate.

"The defender states various defences to the pursuer's demand. He maintains (1) that John Macnab must be held to have discharged his legitim during his life, in respect that, although he knew of his father's death and that he had an interest in his succession, he had no communication with his relatives, and made no claim of one kind or another down to the date of his presumed death. As to this point, I can only say that I know no authority for holding that a claim to legitim can be discharged by mere silence—especially silence in such circumstances as those which are here alleged.

"It is next said that James Macnab, the pursuer's father, would if he had survived been barred as a beneficiary taking benefit under James Macnab's trust-settlement from claiming legitim adversely to that settlement, either in his own right or as representing his brother John, and that the pursuer is in the same position, because, under the Intestacy Act, they take their share of John's estate simply as representing their father James. I am bound to say that this argument, which professes to be founded on the language of the Act of 1855, struck me as novel. What the Act provides is that, "in all cases of intestate moveable succession in Scotland accruing after the passing of this Act, where any person who had he survived the intestate would have been among his next-of-kin shall have predeceased such intestate, the lawful child or children of such person so predeceasing shall come in the place of such person . . . and shall respectively have right to the share of the moveable estate of the intestate to which the parent of such child or children . . . if he had sur-

vived the intestate would have been entitled." The suggestion is that these words not only restrict the children's right of succession to such share as their parent would have taken if alive, but expose them to have their right qualified by the acts and deeds of their predeceasing parent, or at all events his acts and deeds with respect to the subject of the succession.

"I cannot say that I have any difficulty in rejecting this argument. The children take, although representing their father, in their own right. They can no more be affected by the father's debts or deeds than heirs in heritage who succeed through a deceased father to a remoter ancestor, or the issue of a predeceasing parent taking under a settlement that parent's share in virtue of the *conditio si sine liberis*.

It was also maintained that the pursuer can have no title to sue, in respect that she is only one of the five persons interested in the executry. This might, I think, have been a sufficiently good point if the pursuer had been suing the defender simply as executor on the estate of James Macnab, senior; but the present action is not of that description. It is an action directed by a beneficiary against a trustee to compel that trustee to do his duty in a matter where neither he nor the other beneficiaries have any discretion except as affecting their own shares. It appears to me that the action being of this character, is quite properly laid, and the conclusions properly framed."

The defender reclaimed, and argued—it was now admitted that John Macnab would have been entitled to claim legitim from his father's estate. The question was whether the pursuer, as daughter of the brother James Macnab, could claim any part of this legitim. In the first place, her father could have claimed nothing, because by the arrangement between him and Alexander he had given up his claim to the legitim, and, as the daughter only represented the father by virtue of the Intestate Succession Act 1855, she could not be put in a better position than her father would have had—*Turner and Others*, November 27, 1869, 8 Macph. 222. Even assuming she would not have been bound by her father's actings in regard to John's legitim, her father had already received it when he was paid out of the partnership; the pursuer could not therefore claim what had been already given—*Stewart's Trustees v. Stewart*, December 20, 1851, 14 D. 298; *Duke of Buckingham v. Marquis of Breadalbane*, December 15, 1843, 6 D. 250. The pursuer did not properly represent her father, as she was only one of five children, and under the Act the claim must be limited to what the father could have claimed. The Act treated the sum which could be claimed as a *unum quid*, and some of the parties interested in the fund could not bring actions against the deceased's executor for their share, but all interested must combine to seek the fund. No doubt had been thrown upon the case of *Stewart's Trustees* in regard to the doctrine of approbate and reprobate.

The respondent argued—The claim was made under the Intestate Succession Act, but under that Act the children of the predeceasing next-of-kin of the intestate were not bound by their father's acts or deeds; they took as representing their father, but in their own right. The pursuer's father had predeceased John, and he could have had no claim on John's legitim until his death, so that it had never vested, and could not be affected by anything James did. The words of the Act merely afforded a measure of the amount that could be claimed; it had nothing to do with the rights of claimants. In the arrangement of 1869 the legitim of John was not considered; all that was there arranged was on the basis of the conventional provision given to John. There was therefore no question of approbate and reprobate. The defender's whole case on this point rested on the case of *Stewart's Trustees*, but the authority of that case had been doubted—*M'Murray v. M'Murray's Trustees*, July 17, 1852, 14 D. 1048; *Lowson v. Young*, July 15, 1851, 16 D. 1098. The Intestate Succession Act did no more than introduce in the law of moveable succession what had previously been the law of heritable succession. The defender could not say that as John's executor he elected to take his conventional provisions, because the amount of the legitim fund was much larger than the conventional provisions, and he was bound as executor, to make the choice of the largest sum, and as trustee to distribute it among those who were entitled to it—*Ormiston v. Broad*, November 11, 1862, 1 Macph. 10.

At advising—

LORD YOUNG—I concur in the judgment of the Lord Ordinary, and generally upon the grounds stated in his note.

The facts in the case are not numerous. James Macnab, senior, died in 1867, survived by three sons; one of them was John Macnab, and he died in 1891. I use that expression because of an interlocutor of this Court which by Act of Parliament has the effect of holding that he died in that year, and we must take the case upon the footing that he is dead. It is now admitted that at the date of his death he was entitled to a share of the legitim from his father's estate—that is to say, one-third of the legitim funds. There was also a provision in his father's trust-disposition and settlement that the trustees should pay him £1 a-week, with an alternative that if his trustees saw fit they should pay over to him a capital sum of £1500. John, however, had sailed for Australia before his father died, and after that he was not a burden on him or on anyone else. Indeed, it was his obscure life which led to the action in which the interlocutor was pronounced holding that he must be presumed to have died in 1891.

James, another child of the truster, having died in 1884, seven years before the date of John's death, one of his children brings this action against the defender, as John's executor, and says, "I am entitled

to a share of the legitim on James Macnab, senior's, estate to which John was entitled at his death, and I desire that you shall realise the estate and pay me the share that is due to me."

The defender, Alexander Macnab, is not only the executor on his brother John's estate; he is also the sole executor and trustee on the estate of his father who died in 1867, therefore it is his duty as John's executor to obtain from himself as his father's executor the amount of legitim to which John would have succeeded, and pay over to the pursuer her share if she is entitled to get it.

It was pleaded in the Outer House that John was not entitled to claim any legitim at all, because he had survived his father twenty-four years and had never claimed his legitim; that plea, however, is now abandoned, and it is admitted by the defender that John had a right to his share of legitim when he died as I have said in 1891.

Then it was pleaded that John's brother James had so acted that he was precluded from pleading that he was entitled to any share of John's legitim, and that, James having so acted, all his children, of whom the pursuer is one, are precluded in the same way as he would have been.

Now, that plea is good or bad according to whether James' children take their father's share of John's legitim as representing their father or in their own right. If they take it as representing their father, then they must take it subject to his debts and deeds, and if he has in any way barred himself from taking a share of John's legitim, then they also are barred for the same reason. I put the case during the discussion that James had incurred debts; could these debts be made available against any sum his children might recover out of John's legitim? and I think it was conceded that they could not; therefore if his debts and deeds could not be pleaded against the children who are seeking part of the legitim of John, who survived their father for seven years, then they cannot be held as representing him in this action. The statute declares that the children of any person predeceasing the intestate shall come in the place of such person and shall have right to the share of the moveable estate of the intestate to which the person would have succeeded, but the language it uses there has reference only to the amount of the estate to which the predeceaser would have right, and has nothing whatever to do with the rights or objections to the person who claims his parent's share.

Not only therefore was John entitled to his share of the legitim of his father's estate, but that share which would have gone to James if he had survived him and been in a position to claim it must now go to James's children, and a share of that share to the pursuer, and the defender Alexander must show what is the amount of the executry fund and account for it.

I am not moved by any difficulties which have been raised regarding the question

whether there is any legitim due at all to John, because he never exercised his election whether he would take his legitim or his conventional provisions. On the whole matter I think the Lord Ordinary is right.

LORD RUTHERFURD CLARK—I am of the same opinion. I think that the pursuer is one of the heirs *in mobilibus* of John Macnab, and that her right of succession has not been affected by any act or deed of her father James, who predeceased John.

John had two estates, either of which he could choose, viz., his legitim, and the provision under his father's settlement. He made no election, and therefore the right to elect opened to his heirs. When there is more than one heir questions might arise as to the right of taking one estate in preference to the other, and as to the conditions on which the right to elect depended. But no question of that kind can arise here, because it is plain that the legitim is much larger than the conventional provisions.

It was not said that any of the heirs object to the election of the legitim except the defender. We cannot allow him for his own benefit to injure the others. In objecting he is acting contrary to his interest as heir, and for the protection of his individual estate. Where there is an election each and every heir is entitled to his share of the larger estate, and nothing can be done to defeat that right. The election must always be for the benefit of the whole.

Some difficulties might be raised about the form of process which has been adopted here. But I do not enter upon that matter for two reasons, (1) because nothing was said about it, and (2) because the funds out of which John's estate is to be provided are in the hands of the defender. It is his duty to realise that estate and to pay it to those who are entitled to it.

LORD TRAYNER—I concur in the view that we should adhere to the Lord Ordinary's interlocutor.

I think there might have been some difficulty about the form of process had it not been for the fact that that question is not raised upon the record.

The LORD JUSTICE-CLERK concurred.

The Court adhered.

Counsel for the Pursuer—Lord Adv. Balfour, Q.C.—Orr—Christie. Agents—Simpson & Marwick, W.S.

Counsel for the Defender—Asher, Q.C.—W. Campbell. Agents—Webster, Will, & Ritchie, S.S.C.