

Tuesday, July 16.

SECOND DIVISION.

M'CALL'S TRUSTEE v. M'CALL'S  
CURATOR BONIS.

*Succession — Election — Curator Bonis to Lunatic — Power of Curator Bonis to Lunatic to Elect on Behalf of Ward between Legal and Testamentary Provisions — Legitim — Collation — Interest — Judicial Factor.*

A testator, who died leaving four children, two daughters and two sons, by his trust-disposition and settlement conveyed his whole estate, heritable and moveable, to his two daughters and his eldest son as trustees, and directed them (1) to retain £2000 during the lifetime of his younger son, and apply for his maintenance the sum of £100, or such other sum as the principal sum might yield; (2) to pay certain legacies and provisions to his two daughters and his brother's children; and (3) to pay the residue to his eldest son.

The testator left moveable estate of the nett value of £21,927, and two houses of the value of £1900. The two daughters and the elder son were confirmed as executors under the trust-disposition on the testator's moveable estate, and the two daughters accepted the provisions in their favour contained in the deed. The younger son was prior to the testator's death, and had been continuously since that date, unable to manage his own affairs. The trustees did not set aside £2000 for him as directed by the deed, but appropriated for that purpose two of the investments of the trust, the annual income of which investments was £46. The elder son took the entire management of the estate, and after providing for legacies and annuities retained the whole residue thereof. He did not claim legitim or offer to collate the heritage. He sold to one of his sisters one of the houses left by the testator.

The elder son and one of the daughters died, and thereafter a *curator bonis* was appointed on the estate of the younger son, who had been for years and was still an inmate of a lunatic asylum. There was no hope of his recovery. He was never married.

In these circumstances held (1) that the *curator bonis* was entitled to claim legitim on behalf of his ward; (2) that the elder son having never proposed to collate, and having sold part of the heritage and so rendered collation impossible, could make no claim on the legitim fund, and that therefore the amount of the legitim to which the *curator bonis* was entitled on behalf of the younger son was one-third of one-half of the testator's moveable estate; and (3) that interest was payable on the ward's share of the legitim fund from the death of the testator till pay-

ment at such rate as the estate in the hands of the trustee had been yielding.

John M'Call died on 4th December 1882, leaving a trust-disposition and settlement dated 1st December 1880, by which he conveyed to his daughters Mrs Janet M'Call or Lawrie and Catherine M'Call, and to his son John M'Call junior, and the survivors and survivor, as trustees and executors for the purposes after specified, his whole means and estate, heritable and personal. The purposes of the trust were (*First*), to pay debts and sick-bed and funeral expenses; (*second*) "As my son William has in consequence of an accident become unable to manage his own affairs, it is desirable that he should be provided for in the manner following:—And I direct my trustees to hold and retain the sum of Two thousand pounds sterling of my means and estate during his lifetime, and from the yearly interest or proceeds thereof to lay out in such way and apply as they may consider the most expedient the sum of One hundred pounds sterling, or such lesser sum yearly as the principal sum may amount to after deducting the expense of management, for his maintenance and comfort, and that during all the days and years of his life after my death; and in case the said William M'Call decease leaving lawful issue, then I direct the said principal sum, and any interest accumulating thereon, to be paid to and divided among such lawful issue equally, share and share alike, but in case he shall decease without lawful issue, then the same shall form part of my estate, and be disposed of accordingly;" (*Third*) to divide £1000 among the children of the testator's late brother William in the proportions there specified; (*Fourth*) to pay Mrs Lawrie £1000; (*Fifth*) to lay out such a sum as would purchase for Miss Catherine M'Call in the Scottish Imperial Insurance Company a life annuity of £250, and to invest in some other way and on good security so much of his estate as would yield her the yearly sum of £250 during her life after his death, thus giving her an income of £500, and in addition to give her the life enjoyment of his house at Strone and all his household furniture; (*Sixth*) the testator gave the residue of his means and estate to his son John M'Call junior.

The testator was predeceased by his wife and survived by four children, the said John M'Call junior, Mrs Lawrie, William M'Call, and Catherine M'Call. The testator had no antenuptial contract of marriage. John M'Call junior, Mrs Lawrie, and Catherine M'Call were duly confirmed as executors on the testator's moveable estate, which after payment of debts and expenses amounted to about £21,927. The testator also died possessed of two houses, one in Strone of the estimated value of £1100, and the other in Glasgow, sold as hereinafter mentioned for £800.

John M'Call junior took the entire management of the estate. He paid the legacies bequeathed by the testator, purchased an annuity of £250 for Catherine M'Call as directed by the trust-disposition, and there-

after, instead of setting aside a portion of the estate to provide a further annuity of £250 for Miss M'Call, he, with her consent, purchased an annuity of this amount from an insurance company. William M'Call never married, and was, prior to his father's death, and continuously thereafter, unable to manage his own affairs. The trustees did not set aside the sum of £2000 for him as directed by the trust-disposition and settlement, but appropriated for that purpose two investments in the London Tramway Company which had been held by the testator prior to his death, and which at that time represented a value of £1870, but were afterwards redeemed by the Company by a payment to the trustees of £1525. The annual income of the funds appropriated as above stated now amounted to £46. Mrs Lawrie and Catherine M'Call accepted the provisions in their favour contained in the trust-disposition and settlement. John M'Call junior, the heir at law and also the residuary legatee of the testator, did not claim legitim or offer to collate the heritage, which passed to him as part of the residue, subject to Miss Catherine M'Call's liferent of the house at Strone. He sold the house in Glasgow to Miss Catherine M'Call, and retained the proceeds of this house and the whole of the residue of the estate, heritable and moveable, subject as regards the house at Strone to Miss Catherine M'Call's liferent.

Mrs Lawrie died on 10th April 1885 without issue. John M'Call junior died on 24th October 1894 without issue, and leaving a will by which he appointed certain persons his executors and trustees. Catherine M'Call thus became the sole trustee under the trust-disposition and settlement of John M'Call senior.

William M'Call had been for years and was still an inmate of a lunatic asylum, and there was no hope of his recovery.

On 20th February 1900 Thomas Jackson was appointed *curator bonis* on his estate. Catherine M'Call was the nearest relation of William M'Call, and in the event of her surviving him would be his next of kin. In the event of her predeceasing him, his next of kin would be the descendants of his grandfather.

In these circumstances the *curator bonis* of William M'Call contended that on behalf of his ward he was entitled to claim legitim from the estate of his ward's father; that the legitim fund consisted of one-half of the free moveable estate of the deceased John M'Call senior as at the date of his death; that John M'Call junior having taken possession of and retained the heritable estate of his father as his own property, and, never having offered to collate the same, his trustees were barred from claiming to share in the legitim fund, and his claim thereon must be held to have been discharged; that accordingly the said fund was divisible into three parts, of which one belonged to William M'Call; and that interest at the rate of 5 per cent. per annum from the date of death of John M'Call senior was due on William M'Call's legitim, under deduction of the annual payments

made for behoof of William M'Call. On the other hand John M'Call junior's trustees and executors maintained that the *curator bonis* of William M'Call was not entitled, or at least was not *hoc statu* entitled, to elect on behalf of his ward to claim the latter's legitim. Alternatively, they maintained that if legitim was claimable the legitim fund fell to be divided into four parts; that in ascertaining the amount of the legitim fund the value of the testator's heritage did not fall to be brought *in computo*, and that in any event interest was not due thereon.

For the settlement of these questions a special case was presented for the opinion and judgment of the Court.

The parties to the special case were—(1) Miss Catherine M'Call as surviving trustee of John M'Call senior; (2) William M'Call's *curator bonis*; and (3) the trustees and executors of John M'Call junior.

The questions of law were—“(1) Is the second party entitled to claim legitim from the estate of the late John M'Call senior on behalf of his ward William M'Call? (2) In the event of the preceding question being answered in the affirmative, is the said William M'Call entitled to share in the legitim fund to the extent of (a) one-third part, or (b) one-fourth part thereof? (3) In the event of question (b) being answered in the affirmative, does the value of the testator's heritage fall to be brought into account in computing the amount of the legitim fund? (4) In the event of the first question being answered in the affirmative, is interest payable on the said William Call's share of legitim from the date of the death of John M'Call senior to the date of payment, and if so, at what rate?”

Argued for the second party—He, as *curator bonis* to William M'Call, was entitled to elect to claim legitim on behalf of his ward—*Blaikie v. Milne*, November 14, 1838, 1 D. 18; *Robertson, Petitioner*, January 14, 1841, 3 D. 345; *Mitchell and Others, Petitioners*, November 25, 1847, 10 D. 148; *Turnbull v. Cowan*, March 17, 1848, 6 Bell's App. 222; *Morison's Curator Bonis v. Morison's Trustees*, December 3, 1880, 8 R. 205. It was almost certain that the ward would never recover, and the election to take legitim would be so much for the advantage of the ward that the curator was justified in exercising the right. One-third of the legitim fund was the proportion to which William M'Call was entitled. John M'Call junior was the heir, and had never collated. Indeed he had sold part of the heritage and had thus impliedly refused to collate. His representatives could not therefore have any right to a share of the legitim fund. Legal interest at 5 per cent. was payable on William M'Call's share of the legitim fund from the date of the testator's death till payment.

Argued for the third parties—They conceded that there were circumstances in which the Court would authorise a *curator bonis* to elect on behalf of his ward, but this was not a case where that authority should be granted. In any event, the legitim fund should be divided by four, and

no interest should be allowed, or at least interest at no greater rate than had been received by the trustees from the trust estate.

At advising—

**LORD JUSTICE-CLERK**—The first question in this case is, whether the curator of Mr William M'Call, who is insane, is entitled in the circumstances of the case to demand his share of legitim of the estate of his father Mr John M'Call. That the circumstances make it advisable in the interests of his ward that he should do so cannot, I think, be doubted. The case shows that the course proposed to be taken by the curator will not provide more than a maintenance suitable to the position in life of his ward. I am of opinion that it is within the province of the curator to make the election, and that in the circumstances set forth in this case his action cannot be legally impugned by the other parties to the case.

The next question is, whether the share is one-third or one-fourth. The testator's eldest son John took the heritage of his father as his residuary legatee. He did not offer to collate the heritage and claim a share of the general estate, but retained the heritage and enjoyed the proceeds of it till his death. The question is, whether his trustees are now entitled to claim to share in the legitim fund. I am of opinion that they cannot. By taking the heritage as he did, and by selling part of it, John M'Call must be held to have discharged any rights he might have by claim at law against the rest of his father's estate, whether he took the heritage as heir or took it under his father's gift of residue in the settlement. The division of shares of the legitim fund must therefore be into a number exclusive of him.

I would propose, therefore, to answer the first question in the affirmative; the second question—that William M'Call is entitled to share in the legitim fund to the extent of one-third; find it unnecessary to answer the third question, and answer the fourth question by finding that the second party is entitled to interest on his ward's share, but only at such rate as the estate in the hands of the trustees has been yielding.

**LORD YOUNG** concurred.

**LORD TRAYNER**—The right of a *curator bonis* to elect, as on behalf of his ward, between the legal and conventional rights of the ward in his father's succession, cannot be regarded as an absolute right, but only one which he may exercise in certain circumstances. In judging whether that right is to be exercised at all, it appears to me that the interest of the ward is chiefly to be considered. In the present case I am of opinion that the *curator bonis* of William M'Call is entitled to make this election, and I come to that conclusion upon the following considerations:—(*First*) The ward has laboured under his mental incapacity since the date of his father's death in 1862, and the father's will indicates that the ward was even then (that is, in 1880) in the same

condition mentally. This lengthened period of incapacity indicates pretty clearly what indeed was stated at the bar, that the ward in all probability will never recover from his present condition. He will therefore never be in a position to exercise such a right of election himself. (*Second*) The conventional provision, namely, £100 a-year, or "such lesser sum" as might be produced by the investment of £2000, is certainly not more than sufficient for the comfortable maintenance of the ward. Much less is the sum of £46 a-year, which is all that is yielded by that part of the trust fund which has been set aside to meet the provision for William M'Call. (*Third*) In any view which may be taken of the amount to which the ward has right as legitim, it exceeds £3000, the income of which at 3½ per cent. would not be much more than £100 a-year, and therefore, as I have said, not more than what is a reasonable sum to expend on the ward's maintenance. (*Fourth*) The amount payable under the conventional provision being so much less than that which would be yielded by a share of the legitim fund, and the amount which would be yielded by a share of the legitim fund not being in excess of what is needed for the ward's comfortable maintenance, it is obviously in the interest of the ward that the curator should make the election. I am therefore of opinion, as I have said, that he may and can competently do so.

The next question is, what is the amount of the legitim fund? The truster left both heritable and moveable property, and was survived by four children. The eldest son took under the truster's direction the heritable property, but as he was heir thereto *alioquin successurus* he could not have claimed any part of the moveable estate without collation. He took possession of the heritage and disposed of part of it by sale. He never proposed to collate, and he (or rather his representatives, for he is dead) is not in a position now to do so, having parted with a portion of the heritage. The legitim fund, therefore, belongs to the three other children of the truster, and the *curator bonis* in right of his ward is entitled to one-third of that fund. The fund so due to the ward, being a debt due to him by his father's estate, will bear interest, but I think the rate of interest should not exceed that which the first parties were receiving on the trust funds they were administering. In ascertaining the amount due to the curator both as principal and interest account will, of course, be taken of the periodical payments which have already been made to or for behoof of the ward.

**LORD MONCREIFF** The first question is, whether the Court in its discretion should authorise the curator on behalf of his ward to claim legitim. The necessity for an increase of the ward's income is clearly made out, because it has sunk from £100 a-year, the sum contemplated by the truster, to £46 a-year, and there can be no doubt that if the ward were to recover his sanity he would certainly elect to claim legitim which

he would be entitled to do notwithstanding that for so many years payments have been made on his behalf under the will. The following passage in Lord Deas' opinion in *Morison's Curator Bonis v. Morison's Trustees*, 8 R. 213, seems closely in point, viz.—“Now, if this had been a case in which the means of maintenance for the lunatic could not be obtained except by claiming her legal rights, or even if by asserting those rights she were to be accommodated and maintained in a style and manner superior to what she could otherwise have been, I should not have doubted that it was competent for the curator to exercise the option in the way it was reasonable to suppose the lady herself would have exercised it had she been sane.”

The most plausible objection on behalf of the third parties was that they were prepared to make up the ward's annual income to £100 a-year, and that therefore there was no necessity for election. But I do not think that either the curator or the Court is bound to entertain such an alternative. If the provision under the will is insufficient for the ward's maintenance, the proper alternative is that the curator should elect to claim legitim on behalf of the ward.

The next question is, whether the legitim fund falls to be divided by four or by three. The third parties, representing the heir, maintain that they are to be considered as entitled to a share of the legitim. It might be a sufficient answer that even now the third parties have not reprobated the settlement and elected to collate. But I think it is sufficient that John M'Call junior, who was *sui juris*, and indeed managed the whole estate, sufficiently made his election to take under the will by selling part of the heritage and transacting with those of the children who accepted provisions under the will.

It is true that no claim for legitim was made during his lifetime by the younger children, but the heir must be held to have known that it was still open to the ward or his curator to do so.

On the question of interest, I do not think that more should be allowed than the trust funds yielded—probably 3 per cent. would be sufficient.

The Court answered the first question in the affirmative, found in answer to the second question that William M'Call was entitled to share in the legitim fund to the extent of one-third, found it unnecessary to answer the third question, and found in answer to the fourth question that the second party was entitled to interest on his ward's share, but only at such rate as the estate in the hands of the trustee had been yielding.

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Thursday, July 18.

FIRST DIVISION.

[Sheriff Court of Lanarkshire.

MACDONALD v. M'COLL.

*Reparation—Slander—Privilege—Malice—Averment of Facts and Circumstances Inferring Malice—Innuendo—Master and Servant—Character Inconsistent with Previous Certificate.*

In an action of damages for slander brought by a barman against a former master, the pursuer averred that after four years' service with the defender he got a certificate of character from him to the effect that he had left of his own accord, and that the defender had always found him sober, honest, and trustworthy; that about a year after the granting of this certificate the pursuer applied to an hotel-keeper for employment, that the hotel-keeper took him temporarily into his service, and wrote to the defender requesting to be informed as to the pursuer's honesty, sobriety, and ability as bartender, that in answer to this inquiry the defender wrote a post-card in these terms: “*Re yours of yesterday—no good;*” that the statement by the defender in said post-card regarding the pursuer was false and calumnious; that its falsity was well known to the defender; that it was made by the defender recklessly, maliciously, and without probable or any cause; that in consequence thereof the pursuer had lost his situation; and that the defender intended to represent that he was not honest and sober and able to perform the duties of a bartender, and that he was a worthless character, and was not a fit and proper person to fill the post for which he had applied. The defender pleaded that the action was irrelevant, upon the ground that the statement complained of was plainly privileged, and that the pursuer had failed to aver facts and circumstances inferring malice. *Held* (1) That the expression in the post-card was capable of bearing the innuendo put upon it; (2) that the occasion was undoubtedly privileged, and that malice must consequently be relevantly averred; and (3) that the discrepancy between the certificate granted by the defender when the pursuer left his service and the character given by him a year later, was such a special circumstance as to require explanation, and if not explained to entitle a jury to infer malice; that the pursuer's averments were consequently relevant, and that he was entitled to an issue.

*Opinions* (per the Lord President and Lord Kinnear, approving opinion of Lord Kyllachy in *Sheriff v. Denholm*, December 18, 1897, 5 S.L.T. case 309, p. 234), that as a general rule where a defamatory statement is made in