

This was an action at the instance of John Scott Tait, C.A., judicial factor on the estate of the Incorporation of Tailors, Edinburgh, against Mrs Emily Sophia Jackson or Muir and others, concluding for reduction of certain minutes of meetings of the said incorporation whereby the defender was admitted to the said incorporation. The minutes of meetings in question were dated prior to the appointment of Mr Tait as judicial factor.

The question of the validity of the resolutions recorded in the minute was before the Court in the previous case in which the facts are fully stated—see *Tait v. Muir*, December 19, 1902, 5 F. 288, 40 S.L.R. 242.

In the present action the defender pleaded, *inter alia*—(1) No title to sue.

On 16th December 1903 the Lord Ordinary (STORMONTH DARLING) pronounced an interlocutor by which he decerned against the defender Mrs Muir in terms of the conclusions of the summons.

*Opinion.*—“This is an action at the instance of the judicial factor on the estate of the Incorporation of Tailors of Edinburgh, and it is brought for the purpose of reducing certain resolutions of that Incorporation by which the comparing defender Mrs Muir was admitted to the benefit of its widows’ fund. The ground of reduction is that these resolutions were illegal, because they admitted the defender to the widows’ fund without payment, or rather for payment of entry-money which was taken out of the funds of the Incorporation. In a previous action in this Court, to which Mrs Muir was not a party, and which is therefore not *res judicata* against her, but which is nevertheless a standing judgment, these resolutions were held to be illegal, from which it followed that the defender could take no benefit under them. After that judgment was pronounced the judicial factor asked Mrs Muir whether she maintained her eventual right to share in the benefits of the widows’ fund, or whether she admitted that she could not do so without her entry-money being paid in the regular way and in conformity with the rules and regulations of the Incorporation. To that demand she made no reply at all, and accordingly the present action was brought.

“Now, upon the merits of the case I propose to say nothing, because I am content to rely upon the previous judgment of the Court. I confess that I have heard nothing to-day to convince me that the resolutions in question were other than entirely illegal, and there I leave the merits of the case.

“But then it is said that the pursuer has no title to sue the action, and the ground of that plea, as I understand it, is that he is not entitled to complain of anything that took place before the date of his appointment. Now, that is rather a hard saying when one knows that he was appointed for the very purpose of taking the affairs of the Incorporation out of the hands of its existing managers, and in respect of very serious misappropriation of funds by them. If there were anything in

this plea it would have been stated and considered in the previous action. It was so stated and it was disregarded. Accordingly I have no hesitation in holding that the pursuer has not only a title but the sole title to sue the present action.”

The Lord Ordinary then dealt with another question raised in the case.

The defender reclaimed—In support of her plea to title the following authorities were cited—*M’Gregor v. Beith*, May 24, 1828, 6 S. 853; *Gordon v. Williams’ Trustee*, July 16, 1889, 16 R. 980, 26 S.L.R. 750.

Counsel for the respondent were not called upon.

LORD JUSTICE-CLERK—I think that this action is competent and competently presented at the instance of the judicial factor. The judicial factor is in this position, that he has to deal with the estate and present a scheme showing how the association may be carried on. There are also claimants on the widows’ fund who are entitled to know the condition of the fund, and I think that the judicial factor is entitled to bring this action in order that the defender’s claim upon the fund may be disposed of. I see no reason for disturbing the judgment of the Lord Ordinary on either of the preliminary pleas stated by the defender.

LORD TRAYNER and LORD KINCAIRNEY concurred.

LORD YOUNG and LORD MONCREIFF was absent.

The Court adhered.

Counsel for the Pursuer and Respondent—Smith, K.C.—Grainger Stewart. Agents—Macpherson & Mackay, S.S.C.

Counsel for the Defender and Reclaimer—Mackenzie, K.C.—Sanderson. Agents—Wishart & Sanderson, W.S.

Saturday, March 12.

## SECOND DIVISION.

[Lord Kincairney,  
Ordinary.]

### HUTCHESON v. HOGGAN’S TRUSTEES.

*Parent and Child—Aliment and Education—Presumption—Father’s Obligation to Aliment Children Entitled to Separate Estate—Father Held Entitled to Payment from Trustees out of Interest of Fund Belonging to Children of Sums Expended by Him in their Maintenance in Past Years.*

A testator left a trust-disposition and settlement in which he directed his trustees to pay the interest of a certain sum to his daughter, and on her death leaving children to hold and apply the interest for the maintenance, education, and upbringing” of her children till the youngest attained the

age of twenty-five, when the fee was to be divided among the children and their issue *per stirpes*.

The daughter died after the testator and was survived by pupil children. For five years after her death her husband, who had for some time under consideration the reduction of the settlement, made no claim on the trustees for any aliment for his children. Thereafter, on his applying to the trustees for a reasonable sum for the maintenance and education of the children, the trustees, while giving him an annual sum out of the interest of the trust fund for the maintenance and education of the children in the future, refused to pay him anything for the preceding five years, on the ground that during that period he had chosen to defray the cost of their upbringing out of his own funds in fulfilment of his natural obligation, and was not entitled to reimbursement.

*Held* (rev. judgment of Lord Kincairney) that the husband was entitled to payment of a sum towards the arrears of aliment out of the interest of the trust fund accumulated by the trustees.

*Observations* (per Lord Moncreiff) on *Galt v. Boyd*, 8 S. 332.

In February 1903 John Freeland Hutcheson, merchant, Glasgow, raised an action against the trustees nominated and acting under the trust-disposition and settlement of the deceased Andrew Hoggan, writer in Glasgow, dated 5th October 1887, and two codicils thereto dated respectively 14th June 1888, and 22nd March 1893, and as such trustees the tutors and curators to the pursuer's two children James Hugh Hutcheson and Andrew Guy Hutcheson *quoad* their interest under the said trust-disposition and settlement. The conclusions of the action were for payment by the defenders to the pursuer of £1000, with interest at 5 per cent. from 11th November 1896 till payment.

The following facts were admitted on record:—In 1892 the pursuer married Helen Emily Margaret Hoggan, a daughter of the said Andrew Hoggan, and the two children were born of the marriage, viz., James Hugh in 1893, and Andrew Guy in 1895. Mrs Hutchison died in 1896, but both of the children still survived and resided with the pursuer.

On 11th September 1895 Andrew Hoggan died, leaving the trust-disposition and settlement and relative codicils already mentioned.

By the second purpose of the trust-disposition and settlement the truster directed his trustees to set apart and invest £2000 sterling in their names in good heritable or other sufficient security for each of his children Andrew Hoggan junior, Sarah Hampton Hoggan or Pagan, and Laura Maria Hoggan or Macfarlane, and to pay over the interest or annual produce of each of said £2000 to the said Andrew Hoggan junior, Sarah Hampton Hoggan or Pagan, and Laura Maria Hoggan or Mac-

farlane as alimentary provisions to them respectively, and "in the event of the deaths of any of the said Andrew Hoggan junior, Sarah Hampton Hoggan or Pagan, and Laura Maria Hoggan or Macfarlane leaving lawful children, I direct and appoint my said trustees to hold and apply the interest or annual produce of each of said £2000 to each of my said children for the maintenance, education, and upbringing of their respective issue until the youngest of each of their respective issue shall attain the age of twenty-five years complete, when I direct and appoint my said trustees to pay and convey the fee of each of the said £2000 equally among said grandchildren or their issue, share and share alike *per stirpes*," and in the event of any of the said Andrew Hoggan junior, Sarah Hampton Hoggan or Pagan, and Laura Maria Hoggan or Macfarlane dying without leaving lawful issue, he directed his trustees to "divide and pay over the fee of each said £2000 to and among his other children or their issue, share and share alike *per stirpes*." By the third purpose the truster directed his trustees to divide the residue of his estate among his remaining children, including the said Helen Emily Margaret Hoggan, in the manner therein specified.

By the codicil dated 22nd March 1893 the truster authorised and empowered his trustees and executors to increase the sums of £2000 mentioned in his trust-disposition and settlement "to £10,000 sterling to each of my said children, to be set apart and invested in their the trustees' names, for each of my children Andrew Hoggan, Sarah Hampton Hoggan or Pagan, Laura Maria Hoggan or Macfarlane, and on the same conditions and provisions as regards liferent, *jus mariti*, &c., as set forth in said trust-disposition and settlement regarding the sums of £2000," and the codicil proceeds—"Instead of my daughter the said Helena Emily Margaret Hoggan or Hutchison participating in a share of my said means and estate, I hereby authorise and empower my said trustees and executors to place her on the same position and on the same conditions as the said Andrew Hoggan, Sarah Hampton Hoggan or Pagan, and Laura Maria Hoggan or Macfarlane, and to set apart and invest in their the trustees' names the sum of £10,000 sterling for each of them, these sums to be in full of their shares or interest in my means and estate, and to pay to each of them the annual interest or produce of the said sums of £10,000 sterling, all as set forth in said trust-disposition and settlement."

The pursuer averred that since the date of the truster's death until a comparatively recent period he had under consideration the reduction of the codicil, and had been in communication with the defenders on the subject; that he had ultimately been advised that he would not be successful in setting it aside, and that he had then applied to the defenders to make payment to him as guardian of his children of the income which they had received on the £10,000 since the death of their mother; or

at all events for a reasonable sum for their maintenance and education since their mother's death; that the defenders paid him £200 as an allowance for the children's maintenance and education from Martinmas 1901 to Martinmas 1902, and £100 in advance towards their maintenance and education from Martinmas 1902 to Whitsunday 1903, but refused to make any payment for the period from the date of his wife's death in 1896 to Martinmas 1901, and that the present action was raised to recover a like allowance of £200 for that period. He further averred that the cost of the maintenance and education had greatly exceeded the sum sued for.

The defenders stated that the pursuer made no demand for aliment for his children till January 1902. They admitted that the pursuer had taken legal advice as to an action of reduction of the codicil, and that since the death of the pursuer's wife they had accumulated £1972 from the income of the £10,000 provided to Mrs Hutcheson and her children. But they averred—“(Ans. 7) The pursuer having in the knowledge of the private estate belonging to the children chosen to defray the cost of upbringing them prior to January 1902 out of his own funds in fulfilment of his natural obligation to do so, the defenders were not called upon to interfere, and the pursuer is not now entitled to reimbursement of any sums so expended.”

The pursuer pleaded—“(2) The pursuer having provided and paid for the maintenance and education of his two children for the period from Martinmas 1896 to Martinmas 1901, and the defenders having during that period accumulated in their hands income available for providing for said maintenance and education, he is entitled to decree as concluded for with expenses.”

The defenders pleaded—“(4) The pursuer having elected to maintain his children up to January 1902 out of his own funds, is barred from claiming reimbursement of any sums expended for board prior to that date.”

On 4th December 1903 the Lord Ordinary (KINCAIRNEY) pronounced the following interlocutor:—“Repels the second plea-in-law for the pursuer, sustains the fourth plea-in-law for the defenders, assolizies the defenders from the conclusions of the summonses, and decerns.

*Opinion.* — “Andrew Hoggan, writer, Glasgow, died in 1895, leaving a trust-deed and codicils. He was predeceased by his wife and was survived by seven children, three sons and four daughters.

“One of his daughters, Helena Emily Margaret, married the pursuer John Free-land Hutcheson on 10th February 1892. She died on 3rd November 1896. There are two children of the marriage, James Hugh, born 4th March 1893, and Andrew Guy Hugh, born 6th November 1894. These children have lived in family with their father since his wife's death, and have no doubt been supported by him. He has raised this action against Mr. Hoggan's trustees, ‘as such trustees, tutors, and curators to the pursuer's two children,’

and he concludes for payment to himself of £1000, and the plea on which he founds that conclusion is—“2. The pursuer having provided and paid for the maintenance and education of his two children for the period from Martinmas 1896 to Martinmas 1901, and the defenders having during that period accumulated in their hands income available for providing for said maintenance and education, he is entitled to decree as concluded for, with expenses.”

“The truster modified the provisions in his trust-deed by the codicils to his children, including Helena the pursuer's wife. It is not necessary to refer to his bequests to his other children. As I read the deed, the provision which was ultimately left to the pursuer's wife Helena was as follows:—he directed his trustees to invest £10,000 in their names on good and sufficient security, and to pay the interest or annual produce of it to her as an alimentary provision; and on her death leaving issue he directed his trustees to hold and apply such interest or annual produce for the maintenance, education, and upbringing of her issue until the youngest of them attained the age of twenty-five, when he appointed his trustees to pay and convey the fee of the £10,000 equally among the said grandchildren or their issue, share and share alike, *per stirpes*.”

“The pursuer states that at first he contemplated bringing a reduction of one of the codicils, but that he ultimately abandoned that intention, and that then he applied to the trustees for payment of the income which had accrued on the £10,000 since the death of his wife, or at least of a reasonable sum for the maintenance of the children since their mother's death. He states that the trustees paid him £200 as an allowance for the maintenance and education of his children from Martinmas 1901 to Martinmas 1902, and £100 in advance for their maintenance and education from Martinmas 1902 to Whitsunday 1903, but had refused to make any payment for the period from the date of his wife's death in 1896 to Martinmas 1901, and that this action was raised to recover a like sum of £200 per annum for that period. He avers that the cost of the maintenance of the children for that period had exceeded the sum sued for.

“The trustees have stated, what is not denied, that the pursuer made no demand for aliment for his children until January 1902. They admitted that the amount of revenue of the £10,000 provided to Mrs Hutcheson and her children which had accumulated in their hands amounted at January 1902 to £1972, 8s. The defenders pleaded, *inter alia*—“4. The pursuer having elected to maintain his children up to January 1902 out of his own funds, is barred from claiming reimbursement of any sums expended for board prior to that date.

“The question is whether the defenders are bound or entitled, which in this question is the same thing, to pay the pursuer an allowance for the period between the death of the pursuer's wife and the date

when he first demanded aliment, or else repay him the amount which he can show he has expended during that period, limited by the conclusion of the summons to £1000, or whether he ought to be held to have alimented his children in fulfilment of his natural obligation as a father to support them, and therefore to have no claim for reimbursement. No question is raised as to aliment for the future.

“The question is of some difficulty, and there seems to be some want of clear authorities. I have not been able to see my way to accede to the pursuer's demand. I think the aliment afforded by him must be regarded as made *ex pietate* and in fulfilment of his natural obligation. The *dicta* of Lords Corehouse and Gillies in *Galt v. Boyd*, 1830, 8 S. 332, and of Lord President Inglis in *Fairgrieve v. Henderson*, 1885, 13 R. 98, 23 S.L.R. 66, which are I think of great authority, seem adverse to and indeed conclusive against the pursuer's claim.

“The pursuer quoted *Stewart's Trustees v. Stewart*, February 21st 1871, 8 S.L.R. 367; but I think there was no question in that case about payment of arrears. I do not think that any of the other cases which were quoted apply. The question is one of law, and I do not think a proof necessary.”

The pursuer reclaimed, and argued—There was no doubt an obligation on a father to aliment his children, but the obligation was one to keep them from want and to educate and maintain them if they had no other means of support. But if the child had property of his own, that was primarily liable for his maintenance. The father's obligation was subsidiary—*Stair*, i. 5, 7; *Bankton*, i. 6, 7; *Erskine* (Nicolson's edition) i. 6, 56, note; iii. 3, 92; *Fraser's Parent and Child*, 99; *Winrahame v. Eleis*, December 15, 1668, M. 11,433; *Steele's Trustees v. Cooper*, June 16, 1830, 8 S. 926; *Menzies v. Livingstone*, February 27, 1839, 1 D. 601. The *dictum* of Lord President Inglis in *Fairgrieves v. Hendersons*, *supra*, conflicted with his opinion in *Stewart's Trustees v. Stewart*, *supra*. The pursuer was therefore entitled to be paid the aliment for his children from 1896 to 1901 out of the estate belonging to them.

Argued for the defenders and respondents—The judgment of the Lord Ordinary was sound, and was supported by the authorities cited by him. There was a distinction between arrears and future aliment. There was no question as to the pursuer's ability to support his children. There was a natural obligation on a father to aliment his children, and if he maintained them in his own house in accordance with this obligation he was not entitled after doing so to claim from others the sums so spent. He was not in any sense a debtor for arrears of aliment, and having made no claim in the past he must be assumed to have waived it—*Kimmerghame's Creditors v. Hume*, February 1731, M. 11,438; *Galt v. Boyd*, *supra*; *Fairgrieves v. Hendersons*, *supra*. None of the institutional writers said anything about

arrears; they only indicated the conditions regulating future payments.

At advising—

LORD JUSTICE-CLERK—The Lord Ordinary has stated that he considered the case to be one of difficulty, and has felt compelled by certain decisions which he quotes to decide in favour of the defenders. I have found myself unable to agree with the conclusion at which he has arrived, my opinion being that the pursuer is entitled to succeed.

The deed under which the trustees and defenders hold this estate, as modified by a subsequent codicil, directed them, as regarded any issue of certain children named, in the event of the death of the parent to “hold and apply the interest or annual proceeds of £10,000 (which was given to each child) for the maintenance and education and upbringing” of the issue of the child so dying, until the youngest should attain twenty-five years of age. This is a direct order to the trustees so to dispose of the annual proceeds, and contains nothing tending to indicate any intention of accumulation.

The facts are that one of the daughters who married the pursuer died, and the right of the children to the annual proceeds of her share for their maintenance and education emerged, but the trustees did not apply the annual produce as directed, the daughter's husband having for some years brought up the children himself, and not having made any demand on the defenders for reimbursement. They accordingly accumulated the annual proceeds. The father gives as his reason for not making any demand that he for a considerable time contemplated bringing a reduction of the settlement, and that therefore he did not choose to make a claim under it while it was uncertain whether he would proceed to the reduction. Ultimately he abandoned his intention, and then demanded that the trustees should provide him with the funds allocated by the will to the maintenance and upbringing of his children. This the trustees have provided for the period since he made the demand, but they refuse to pay the cost of the previous maintenance, maintaining that he must be held to have supported the children *ex pietate*, and that they are entitled to retain as accumulated funds what has been saved by his acting as he did.

This view the Lord Ordinary has adopted. I do not think it is a sound view. These children had right to a separate estate, and that being so the father's obligation to them was subsidiary only. If what the trustees held for their behoof was sufficient, it was their duty to see it applied in accordance with the directions of the truster. Their position on realising annual produce was that of debtors for the necessary charges of the upbringing and maintenance. I cannot see that there is any ground for holding that in this case the father waived his claim to have what was ordered to be applied for the children's present benefit so applied, and I am satisfied that there is no sufficient

ground for refusing him reimbursement from the funds expressly devoted by the will to the maintenance and upbringing of the children of what he has expended for these purposes.

I am therefore in favour of recalling the Lord Ordinary's interlocutor and granting decree.

**LORD TRAYNER**—By his trust-settlement the late Mr Hoggan (who died in 1895) directed his trustees, *inter alia*, to pay to his daughter the late Mrs Hutcheson as an alimentary provision the interest on a certain share of the residue of his estate, and the fee of that share to her issue on their attaining twenty-five years of age. He further provided a sum of £2000 to certain other of his children in liferent and their issue in fee. By codicil Mr Hoggan altered his settlement in so far as he increased the £2000 provision in each case to £10,000, and as regards Mrs Hutcheson he directed that instead of participating in the residue the trustees should set aside and invest for her behoof £10,000, and pay her the interest, "all as set forth" in his settlement. Mrs Hutcheson was therefore placed in the same position as those other members of the family for whose behoof a specific sum was set aside. The directions to his trustees with regard to these specific legacies were, that they should hold the capital and pay over the interest or annual income thereof to the legatees and at their death to hold and apply the interest or annual "produce of each of said £2000 (afterwards increased to £10,000) to each of my said children, for the maintenance, education, and upbringing of their respective issue," until the youngest of them attain the age of twenty-five, when the fee was to be paid to them. Mrs Hutcheson died in 1896, leaving two children of tender years, who have since resided with their father the pursuer. The present action is for recovering from the defenders Mr Hoggan's trustees, the sum of £1000 as aliment for said children, being at the rate of £100 per annum for each, from 1896 to 1901. No objection is stated to the rate of aliment claimed by the pursuer, but the defenders contend that, as the pursuer maintained his children during those years without making any demand on them for any alimentary allowance he must be presumed to have acted *ex pietate*, and has no claim now for the sum so expended by him. This view the Lord Ordinary has adopted, and assailed the defenders. I cannot concur in that judgment. If the pursuer had been unable to offer any reasonable explanation of his failure for five years to apply to the defenders for any part of the income of the share of the trustor's estate towards the maintenance of his children, I think such failure would have presented more difficulty in the pursuer's way than in my opinion it does, all the circumstances considered. The explanation offered by the pursuer appears to me to account reasonably for his delay in making his claim. That explanation is that he contemplated for some time the question whether he would attempt to reduce Mr

Hoggan's codicil—the effect of reduction would have been to enhance the interest of Mrs Hutcheson and her children in the succession. Such a step could not, of course, have been taken without due consideration, and is now after such consideration along with professional advice abandoned. But the pursuer evidently feared that asking or taking any advantage under the settlement would preclude his challenge of the codicil. No doubt five years was a long time to have such a challenge in contemplation without coming to any definite resolution on the subject. Still, I am not prepared to say that the pursuer's delay in making a demand on the defenders necessarily gave them any reason for thinking that he was to maintain his children at his own expense. Especially as he knew that under the settlement of Mr Hoggan there was a fund set aside for their maintenance. Indeed, I am not sure that it was not as much the duty of the trustees to tender the pursuer part at least of the income derived from the children's money (£10,000) as it was the duty of the pursuer to ask it. The trustees were expressly directed to pay the annual income of that money (or I shall assume the part of it that was required) for the maintenance and upbringing of the children. To accumulate the whole of the income was contrary to the trustor's intention and express direction.

If the pursuer, instead of the defenders, had been the holder of the fund destined to his children, there is abundant authority for holding that in his subsequent accounting with them, when the fee came to be paid over, he would have been allowed to balance the expense of the children's maintenance against this yearly revenue—not touching the capital, but placing maintenance (so far as proper) against the interest of the capital. I see no reason why the pursuer should be in a worse position because the defenders held the fund, seeing that they held it under express direction to apply it as I have pointed out.

The presumption that the pursuer maintained his children *ex pietate* does not appear to me to be very strong in the circumstances of this case. To give the pursuer what he asks will do no injustice to anyone, and will only carry out the beneficent intention of the trustor. I think, therefore, the pursuer should have decree.

**LORD MONCREIFF**—This case was argued by both parties as if we had before us all the information required for the decision of the case; and apparently the Lord Ordinary decided it on that footing. I should have desired some fuller explanations. But I must assume that the material facts are sufficiently disclosed.

The Lord Ordinary has decided against the pursuer mainly on the authority of *Galt v. Boyd*, 8 Sh. 332. I differ from his Lordship, and I think that that case presents no obstacle to the pursuer's claim.

Before considering the law let us see how the facts stand. The pursuer's wife, who was the daughter of Mr Andrew Hoggan,

died in 1896, leaving two children of her marriage with the pursuer. Under the testamentary writings of Mr Hoggan his trustees were expressly directed in the event of the death of the pursuer's wife to apply the interest of the sum set apart for her (£2000, increased to £10,000) for the maintenance, education, and upbringing of her issue until the youngest child should attain the age of twenty-five years, on which event the fee of the provision should be divided equally among the grandchildren. The trustees were given no power of accumulating the interest in that provision.

It appears that on the death of the trust Mr Hoggan in 1895, his son-in-law the pursuer challenged the validity of the settlement, and a lengthy correspondence took place between him and the defenders on the subject. Ultimately the pursuer became satisfied that he could not challenge the codicil with success, and in 1902 he applied to the defenders to pay to him a reasonable sum for the maintenance and education of his two children in the future, and at the same time demanded payment of arrears for the preceding five years during which he had maintained and educated them at his own expense.

The present action is confined to demanding payment of £1000, as representing the sums which during the five years preceding 1902 the pursuer had expended upon the maintenance and education of his children. The Lord Ordinary has decided that in regard to the arrears the pursuer must be held to have maintained and educated his children *ex pietate*. I am not of that opinion.

A parent who is able to do so is bound to educate and maintain his children until they are of an age to support themselves, but if the child has a separate estate the father is entitled to repay himself or to be repaid advances properly made for the maintenance and education of the child, at least to the extent and interest of the separate estate. The bulk of authority is, I think, to this effect. Lord Stair says (i. 5, 7)—“If the children be competently provided *abunde*, the parents are not bound.” Erskine says (i. 6, 56) that a parent may exact board from a child who enjoys a separate estate of his own. Lord Fraser (Parent and Child, p. 100) states the law to the same effect, and refers to several cases which support that view of the law. The question, however, is one of circumstances and intention, and it may be conceded that where a parent possessed of sufficient means alimts his children who are possessed of separate estate without making any arrangement, the presumption is that the aliment is given *ex pietate*. But this presumption can be overcome by proof of circumstances indicating that the aliment was not given *animo donandi*. Now, in the present case, as the pursuer educated and supported his children for five years without making any demand for repayment from the defenders, it lay upon him to show that in doing so he did not intend to make a donation. He does so in this

way. He points out, in the first place, that the defenders are expressly directed to apply the annual produce of the provision for the maintenance, education, and upbringing of the children. No such payment was made until 1902, and the interest, contrary to the provisions of the deed, has been accumulated by the trustees. It is still there and available. Secondly, he explains his delay in making his demand by stating, as seems to be the case, that he was desirous of reducing the second codicil. I think that these two things taken together are sufficient to indicate that the pursuer in making the advances did not intend to abandon his claim of relief against the defenders.

No doubt he was dilatory in making a demand for repayment of his alimentary advances; but on the other hand he was for a considerable time considering whether the settlement, or at least the second codicil, could not be set aside, and he knew that the interest upon the provision which was being accumulated was ample to meet his claim if he chose to make it. There is also something to be said for his contention that the defenders should have tendered the interest to him, as they were directed to do by the terms of the will.

An examination of the case of *Galt*, upon which the Lord Ordinary relies, shows that there were special reasons for holding that the father was barred from making any such demand. It seems that Mr Mark Sprot left a settlement under which Edward Boyd (Sprot's son-in-law) and John Sprot were named trustees and executors. By that settlement a sum of £2000 was left in trust, the interest on which was directed to be applied to the maintenance of Edward Boyd's daughter Joanna till she attained the age of twenty-one; but if she predeceased (which she did), the £2000 was to be divided equally among the other children of Edward Boyd and Sprot's daughter.

Mark Sprot died on 25th March 1808. On 13th March 1809 Edward Boyd borrowed £2000 from the other trustees, and granted a bond and disposition in security over his lands of Woodhead, in which he bound himself to apply the interest of the sum borrowed towards the maintenance and education of his daughter Joanna till she attained the age of twenty-one; but in the event of her predeceasing that age he simply bound himself to make payment of the sum borrowed, with interest, to his other children.

Joanna Boyd died on 27th June 1810, and the other children of the marriage lived *in familia* with their father till 1828. The Court decided that the aliment furnished to these children between 1810 and 1828 must be held to have been given *ex pietate*, and that the father must be treated just as any other borrower of money, and held liable to repay the principal sum with interest. The special nature of the case is fully shown in Lord Corehouse's note. He begins by saying: “When a father who is debtor to his children pleads compensation in the aliment he has furnished to them, the application of the maxim *debitor non*

*presumitur donare* will, for the most part, depend upon the particular circumstances of the case." He then goes on to point out that Edward Boyd had recognised his position as an ordinary borrower, in respect that in the bond and disposition in security which he granted, while he took power to apply the interest to the maintenance and education of Joanna, no such power was given in the event, which happened, of the devolution of the legacy to the remaining children. He adds that the father having borrowed his children's money, it was his duty, more especially as he was a trustee and executor, to settle explicitly whether the interest was to be applied in the shape of aliment or not; and that he did settle it in the way which seemed most agreeable to the will of the testator.

I accordingly read that decision and the opinions of the Judges in the light of the explanations given by Lord Corehouse, which simply come to this, that it was plain from the father's own deed and actings that he did not intend to claim repayment of the sums expended by him upon the maintenance and education of his children other than Joanna.

I am aware that there are *dicta* in other cases which if taken by themselves might be read as meaning that a father who has means of his own is not entitled to recoup himself out of the interest of separate estate belonging to his children. For instance, in the case of *Fairgrievies v. Hendersons*, 13 R. 100, the Lord President, in distinguishing the position of a mother from that of a father in this matter, is reported to have said— "The father's obligation to aliment his children is absolute and unconditional; he is not in a position to say that the children shall maintain themselves out of any money they may have before he is called upon;" and he quotes in support of that statement Lord Gillies' remarks in the case of *Galt*. Now, Lord Gillies' remarks were made, I think, with special reference to the facts of the case with which he was dealing; and if the Lord President's words are to be read as meaning that a father who is not in indigence cannot in any case recoup himself for advances made for the aliment and education of his children when the children are amply provided for *aliunde*, I think this is not in accordance with the statement of the law either by Stair or Erskine.

But in the present case it may be sufficient that the deed which settled the separate fund upon the children expressly directed the trustees to devote the annual produce to the maintenance and support of the children.

On the whole matter I think the pursuer is entitled to the decree which he asks.

LORD YOUNG was absent.

The Court pronounced this interlocutor:—

"Recal the said interlocutor appealed against, and grant decree in terms of the conclusions of the action; Find the

expenses incurred by both the pursuer and the defenders payable out of the accumulations of income referred to in condescence seven, and remit" &c.

Counsel for the Pursuer and Reclaimer—Salvesen, K.C.—the Hon. W. Watson. Agents—Webster, Will, & Company, S.S.C.

Counsel for the Defender and Respondents—H. Johnston, K.C.—Hunter. Agents—Dove, Lockhart, & Smart, S.S.C.

Saturday, March 12.

## SECOND DIVISION.

[Dean of Guild Court,  
Greenock.]

### CAMERON v. CALEDONIAN RAILWAY COMPANY.

*Burgh—Street—Formation of Public Street—Lands "fronting or adjoining" Street—Railway—Bridge Conveying Street over Railway—Liability to Assessment—Greenock Corporation Act 1893, sec. 34.*

By section 34 of the Greenock Corporation Act 1893 it is provided that "the proprietors of all lands and heritages in such street, or fronting or adjoining both sides of the line of such street," shall pay and relieve the corporation of the expense of the formation of any public street within the burgh in proportion to the length of their frontage.

In 1884 a railway company acquired house property in an uncompleted street in Greenock, and demolished the houses on both sides and excavated the ground for the purposes of their line, which ran under the street at right angles to it, substituting for the portion of the street excavated a bridge with parapets and steps giving access to the railway station underneath.

In 1903 the corporation decided to complete the formation of the street by causewaying the carriageway, &c.

*Held* that the railway company were liable under section 34 of the Act to pay the expense of the formation of the street so far as carried by the bridge.

*Great Eastern Railway Company v. Hackney Board of Works*, 1883, 8 App. Cas. 687, distinguished.

Section 33 of the Greenock Corporation Act 1893 provides that where any public street or portion of a public street shall not have been completed, it shall be competent to the Procurator-Fiscal, by direction of the Corporation as Board of Police, to present a petition to the Dean of Guild craving warrant to complete the formation of the street in the manner therein mentioned at the expense of the proprietors of lands and heritages in such street or portions of a street.