

undue concealment. I think that is a verdict for the pursuer, and that this is not the case of an alternative issue in the ordinary sense of that term. It is an issue as to one ground of reduction, namely, essential error. It is alternative only as to the mode in which the error was induced. It was said that undue concealment only applied to cases where there was a duty of disclosure, and it was proposed to read this issue as if the word "undue" was not in it. I think that is taking too great a liberty with the issue.

The pursuer was allowed expenses from the beginning, subject to modification.

Agents for Pursuer—Macgregor & Barclay, S.S.C.

Agent for Defender—Thomas Ranken, S.S.C.

Wednesday, Nov. 21.

SECOND DIVISION.

ADAM v. LATTA (TUNNOCH'S TRUSTEE).

Bankruptcy—Appeal—Expenses. Held that a trustee who had unsuccessfully resisted two claims on a sequestrated estate which were identical in interest and involved the same inquiry was not entitled to deduct the expenses of either action from the dividend payable to either of them.

Mr Adam of Messrs Adam & Kirk had for some time a cashier in his employment. He afterwards assumed a partner, and the cashier continued in the employment of the firm of Adam & Kirk. He died while in this employment, and his estates were ultimately sequestrated. A claim in the sequestration was brought by Mr Adam, on the ground that while the cashier was in his individual employment he had embezzled and appropriated to his own uses large sums of money by over and under summing the cash books. A similar claim was brought by the firm on the same ground, applicable to the period during which the cashier was in the firm's employment. The trustee rejected both claims, but on appeal they were sustained by the Court. The trustee then prepared a state of the funds, out of which the final dividend was to be paid, and he proposed to deduct from the divisible fund the expenses of the litigation, which he had unsuccessfully maintained. The claimants appealed to the Lord Ordinary (Ormidale), praying him to rectify the state of the trustee, and to add to the divisible fund the whole of the expenses in both processes, so that their dividend might not thereby be diminished. The Lord Ordinary pronounced the following interlocutor:—

"*Edinburgh, 27th July 1866.*—The Lord Ordinary, having heard counsel for the parties, and considered the argument and proceedings, sustains the appeal, and recalls the deliverance of the trustee complained of, but in so far only as it proceeds on the footing that the expenses of the litigation in question, betwixt the appellants and the trustee, have been properly paid out of the estate, and in so far as concerns the sum of £10 referred to in the appeal; and remits to the trustee to rectify the state of the funds, and to rank the appellants on the footing and to the effect that, in so far as their claim is concerned—(1) No part of the expenses of said litigation, as betwixt them and the trustee, is to be paid out of the estate; and (2) the said sum of £10 is not to be paid out of the estate;—and decerns: And in respect that each of the parties has been partly right

and partly wrong, finds neither entitled to any expenses.

"R. MACFARLANE.

"*Note.*—In regard to the £10 there was no discussion before the Lord Ordinary, as it was at once admitted on the part of the trustee that, in regard to that sum, he had made a mistake which he was ready to rectify. In regard to the appeal otherwise, the Lord Ordinary holds it to be a well established principle of law that no part of the expenses of a litigation betwixt a trustee for the general body of creditors and a claimant whose debt is disputed, but who has succeeded in the litigation, and been found entitled to the expenses thereof, can be allowed to affect or diminish the dividend—Houston and Others v. Duncan, 25th November 1847, 4 D. 80, and the cases there cited. The Lord Ordinary, however, cannot extend the principle the length of holding that, in a question with the appellants, Messrs Adam & Kirk, the trustee must not only take care that their dividend is not affected by any of the expenses in the litigation with them, but also that it is not affected by the expenses incurred in the litigation with the other appellant, Mr James Adam. No authority was cited in support of any such extension of the principle, and the Lord Ordinary has been unable to see any sufficient reason for so extending it, especially in the present instance, where it was admitted, in the course of the discussion, that the appellants had not, by protest or otherwise, expressly stated their dissent from the litigation which took place with the other appellant."

The claimants reclaimed.

A. R. CLARK and MACKAY, for them, contended that there was no principle upon which the two cases should be distinguished as they were by the Lord Ordinary. The claims were identical and should be similarly disposed of.

PATTISON and WATSON supported the interlocutor of the Lord Ordinary.

The Court recalled the Lord Ordinary's interlocutor, and held that in the specialities of the case, which did not admit of its being used as a precedent unless the precise circumstances concurred, the interest of Mr Adam, and of Adam & Kirk being identical, and the case of both against the trustee being the same, and established by the same proof, the fairest mode of dealing with the case was to hold that the trustee was not entitled to charge any of the expenses of either appeal in a question with either of the appellants against the appellants' final dividends.

Lord BENHOLME concurred with the other Judges on the ground rather of community than of identity of interest between the claimants.

Agent for Claimants—Alex. Howe, W.S.

Agent for Trustee—James Somerville, S.S.C.

Friday, Nov. 23.

FIRST DIVISION.

STUART v. M'BARNET.

Salmon Fishings—Opposite Proprietors—Narrow Stream—Title to Prevent Fishing—Interdict—Trespass. A. and B. were opposite proprietors on the banks of a narrow stream, the whole breadth of which was swept by fishing from either side. A. held a Crown grant of lands *cum piscationibus* fortified by immemorial exercise and possession of salmon fishing. B. held a title to salmon fishings over one-half of the