in July 1893 the defender at once reminded his father that he had promised to destroy the bond, which was a very improbable answer to give unless the defender had some warrant for such a statement.

On the whole matter I am of opinion that the *onus* was upon the pursuer, and that in the circumstances he was bound to establish and has not established a sufficient *casus amissionis*.

LORD JUSTICE-CLERK—This is certainly a distressing case in its circumstances and much to be regretted. There is no doubt that a family quarrel of long standing had existed, and doubtless has led to a good deal of personal feeling between the parties. As regards the case of the pursuer Mr Brodie, it is quite certain that he is committing wilful perjury if it be the fact that that bond was destroyed by him. But it is perfectly open to consideration whether certain statements by him in regard to his intention of no longer exacting the sum in the bond from year to year have not been exaggerated in the midst of these family quarrels into an assertion that he had destroyed it. Giving the best consideration I can to the case of the pursuer, and having read Lord Trayner's opinion on the case, I concur in it, and therefore am in favour of holding the *casus amissionis* proved.

LORD YOUNG was absent.

The Court pronounced an interlocutor in which they found the *casus amissionis* of the bond of annuity libelled proven, and decerned and declared accordingly in terms of the conclusions of the summons, and found the pursuer entitled to expenses since the closing of the record.

Counsel for the Pursuer—A. S. D. Thomson. Agents—W. & J. L. Officer, W.S.

Counsel for the Defender — Jameson, K.C.—Guy. Agent—A. C. D. Vert, S.S.C.

Wednesday, November 13.

FIRST DIVISION.

[Lord Low, Ordinary.

ANDERSON *v.* ANDERSON'S TRUSTEE.

Expenses — Trustee — Personal Liability — Decree against Trustee without Qualification in Interlocutor — Trust Estate — Action by Widow against Husband's Testamentary Trustee—Jus relictæ to be Computed before Deducting Expenses incurred by Trustee—Trust.

A trustee who carries on a litigation is personally liable for expenses found due to the opposite party.

Where in an action against a trustee the conclusion for expenses was against the defender "as trustee and executor foresaid," and the Court found "the defender liable to the pursuer in expenses," *held*, that this interlocutor imported personal liability against the trustee.

A widow brought an action against the sole surviving trustee under her husband's settlement, concluding for the delivery of certain stocks and shares standing in his name and alleged to belong to her, and for *jus relictæ*. The trustee, while admitting the claim for *jus relictæ*, defended the action in so far as relating to the other claim. The widow obtained decree, and was found entitled to expenses. *Held* (*reversing* judgment of Lord Low, Ordinary) that in computing the amount of the estate available for *jus relictæ* the trustee was not entitled to deduct either the expenses in which he had been found liable or his own expenses in defending the action; reserving all questions of his right of relief in a question with the beneficiaries under the settlement.

Mrs M. R. Moon or Anderson, widow of the late Dr Alexander Anderson, brought an action against Donald Anderson, marine engineer, Birkenhead, sole remaining trustee acting under the trust-disposition and settlement of the said Dr Anderson.

The conclusions of the action, in so far as it is necessary to refer to them for the purposes of the present report, were for declarator (1) that certain specified stocks or shares vested in the name of the late Dr Anderson were held by him in trust for the pursuer; (2) that the defender, as trustee foresaid, should be ordained to deliver these stocks to the pursuer, and failing his doing so should make payment to her of the sum of £4500; and (3) that the defender should be ordained to produce a full account of his intromissions with the trust funds in order that the amount due to the pursuer as *jus relictæ* might be ascertained, or failing such an account to pay the sum of £2500.

There was also a conclusion for expenses against the defender "as trustee and executor foresaid."

The circumstances under which this action was raised may be summarised as follows:—

Dr Anderson and the pursuer were married in 1886. There were no children of the marriage. At the date of the marriage the pursuer was possessed of separate estate, and during the marriage at various times she handed over certain sums of money to her husband, including two sums of £526 and £1247. These sums were invested by him in certain securities which at the time of his death had greatly increased in value. Dr Anderson died in 1896, while still vested in these securities. He left a trust-disposition and settlement by which, subject to certain legacies and provisions, including certain provisions in favour of the pursuer and of his brothers and the survivor of them, he directed his trustees to pay two-thirds of his estate to the children of the defender and one-third to the children of a niece. The pursuer repudiated the provisions made for her and claimed her legal rights. The estate left by Dr Anderson, including the shares claimed by Mrs Anderson, was estimated to be worth about £4500.

On 16th June 1899 the Lord Ordinary (Low) pronounced an interlocutor by which, after certain findings in fact, he made the following finding:—"In these circumstances finds that the pursuer is entitled to claim against Dr Anderson's estate—(1) the said sum of £526; (2) the said sum of £1247; and (3) the profits realised upon the Simner and Jack shares purchased with the last-mentioned sum. . . . ." "Appoints the defender to lodge in process a statement giving effect to the foregoing findings: Reserves all questions in regard to interest and expenses of process: *Quoad ultra* continues the cause, and grants leave to reclaim."

Against this interlocutor the defender reclaimed, and on 23rd February 1900 the following interlocutor was pronounced:—"The Lords having considered the reclaiming note for the defender against the interlocutor of Lord Low, dated 16th June 1899, and heard counsel for the parties, Recal the said interlocutor . . . in so far as it 'appoints the defender to lodge in process a statement giving effect to the foregoing findings:" *Quoad ultra*, adhere to the said interlocutor, and decern: Find the defender liable to the pursuer in expenses since the date of the interlocutor reclaimed against, and remit the account thereof to the Auditor to tax and to report to the Lord Ordinary; and remit to his Lordship to proceed, with power to decern for the taxed amount of said expenses."

In pursuance of the remit to him, the Lord Ordinary on 2nd March 1901 pronounced the following interlocutor:—"Decerns and ordains the defender to make payment to the pursuer of £3458, 3s. 9d., with interest thereon at the rate of 5 per centum per annum from 29th February 1896 till payment, but that under deduction of the sum of £2000 paid by the defender to account on 2nd August 1900, with interest on said last-mentioned sum from said 2nd August 1900 at the foresaid rate: Finds the pursuer entitled to expenses, reserving, however, the question whether the amount ought not to be modified to be considered when the report of the Auditor is received: Allows an account of said expenses to be given in, and remits the same when lodged to the Auditor to tax and to report: Finds that in a question with the pursuer as a widow claiming *jus relictæ* the defender is entitled to deduct the expenses which he has incurred in this action (including those in which he has been found liable to the pursuer) from the amount of the estate remaining in his hands after payment to the pursuer of the balance of the foresaid sum of £3458, 3s. 9d., with interest as aforesaid: Finds that it is conceded that the said expenses incurred by the defender will exhaust the estate remaining in his hands after said payments, and that there is therefore no fund out of which payment of *jus relictæ* can be made to the pursuer: Therefore dismisses the conclusions of the summons in so far as not already disposed of, and decerns."

"*Opinion.*—The pursuer has been entirely successful as regards the leading claim which she made in this action, and therefore I think that she is entitled to an award of expenses. It may, however, be necessary to modify the amount to some extent in view of certain procedure which took place in the later stages of the case, but that is a matter which I shall reserve until the Auditor's report is before me.

"The next question is, whether the defender should be found personally liable in expenses. It was argued for the pursuer that the defender defended the action in his own interests and in the interests of his family, and must therefore be dealt with as having done so at his own risk and expense.

"By his settlement Dr Anderson provided an annuity of £70 to his brother John Anderson, who, I understand, is not able to do anything for his own support. The pursuer was given a liferent of the whole remaining income of the trust-estate, and upon her death the income liferented by her (except in so far as it was reduced by payment of legacies) was to be divided among the truster's three brothers, John Anderson, Dr Robert Anderson, and the defender, and the survivors. Upon the death of the survivor of his brothers, Dr Anderson directed his trustees to realise the estate and to pay two-thirds thereof to the children of the defender and one-third to the children of a niece, Mrs Matthewson. Dr Anderson also left legacies payable upon the death of the pursuer to the amount of £650.

"Now the pursuer's claim was that the great bulk of the means invested in Dr Anderson's name at his death, and *prima facie* falling under his trust-disposition and settlement, did not belong and never had belonged to him but was her property. The result of conceding the pursuer's claim would have been that practically no estate would have been left to be dealt with under the settlement. The papers left by Dr Anderson gave no support to the pursuer's claim. There was indeed a letter by her to him in which she made a gift to him of £2000, and if her claim had only been that she was entitled to revoke the gift and reclaim the £2000 there would, I take it, have been no litigation. But the pursuer's claim went far beyond that. Her case was that she had entrusted Dr Anderson with the £2000 for the purpose of investing that sum for her, and that therefore she was entitled not only to the capital sum but to the large profits which had accrued upon the investments. That claim was not made until a very considerable time after Dr Anderson's death, and the pursuer had previously put forward different and inconsistent claims.

"In these circumstances I am of opinion that the defender was, as trustee, justified in defending the action in the interests of all those having right under Dr Anderson's settlement, and I do not think that the fact that he and his children had a considerable interest in the result is sufficient to justify me in dealing with him in the matter of expenses otherwise than as a trustee who has defended the trust estate

upon probable grounds against a claim which, if successful, would have carried off practically the whole estate. I may also observe that the position of matters which existed at Dr Anderson's death was due to the pursuer's own actings, because she handed over her money to Dr Anderson and allowed him to deal with it as he liked, and she allowed herself to be persuaded to grant the letter of gift which has caused so much difficulty. I therefore cannot find the defender liable personally in expenses.

"The next question with which I must deal is one of difficulty, and upon which the authorities, so far as I am aware, throw but little light. The pursuer claims *jus relictæ*, and if the expenses of this litigation were left out of view there would be a few hundred pounds due to her under that head. If, however, the defender is entitled to claim relief of the expenses which he has incurred against the trust estate it is conceded that no fund will remain out of which *jus relictæ* could be paid.

"I have upon a previous occasion stated my reasons for coming to the conclusion that in a question with the pursuer the expenses incurred by the defender must be regarded as expenses of administration, which fall to be deducted before ascertaining the amount of *jus relictæ*. That amount could not be ascertained until the pursuer's leading claim was disposed of, because until then it was impossible to say what Dr Anderson's estate consisted of. Further, I do not think that anything can be founded upon the fact that the claimant was the widow. If a claim had been made by a third party to the bulk of the estate on the ground that it belonged to him, and that Dr Anderson had truly held it in trust for him, I think that expenses incurred by the defender in opposing the claim, if such opposition had been reasonable and in accordance with the defender's duty as trustee, would have fallen to be regarded as expenses of administration, to be deducted from what was truly the trust estate before ascertaining the amount of *jus relictæ*. But that appears to me to be just the case with which I am dealing, unless the fact that the claimant was the widow makes a difference, which in my opinion it does not. The difficulty in giving effect to that view in this case is that it involves dealing with the question of the defender's right of relief against the trust estate in the absence of the beneficiaries. The pursuer's interest in the trust estate, however, is confined to her claim for *jus relictæ*, and I think that it is competent to determine now that in a question with her nothing has occurred to deprive the defender of his right of relief against the trust estate, and that that right of relief extends (again in a question with her) to the whole trust estate. I accordingly propose to make a finding to that effect, and further, to find that that being so it is conceded that there is no fund available for payment of *jus relictæ*.

"There was one argument submitted for the defender which I must notice. He contended that in the event of the estate remaining in his hands after deducting the sums to which the pursuer has been found entitled, with interest, not being sufficient to relieve him of the expenses which he has incurred (which I imagine will very probably be the case) he is entitled to encroach upon the sum which has been found to belong to the pursuer to the effect of completely relieving himself of expenses. In support of that view the defender founded upon the case of *Drummond*, 8 R. 449. The circumstances of that case were very peculiar, and I do not think that any principle of general application can be deduced from it. The pursuer here has succeeded in establishing that the greater part of the funds invested in Dr Anderson's name never belonged to him but was her property. It therefore seems to me that the defender has no claim of relief against what is and was the pursuer's estate, but only against estate which truly belonged to Dr Anderson, because that alone can be regarded as trust estate."

The pursuer reclaimed, and argued—A trustee was personally liable for expenses found due in an action to which he was a party—*Craig* v. *Hogg*, October 17, 1896, 24 R. 6, 34 S.L.R. 22. The principle was, that if a trustee chose to litigate he was liable in expenses to the opposite party just as much as if he were litigating in his own interest. It was for him to see that the beneficiaries were prepared to indemnify him—*Cowie* v. *Muirden* (1893), A. C. 674, *per* Lord Watson, p. 690. It was of course open to the Court to limit the finding of expenses, and make it a finding against the trustee solely in his representative capacity —*Craig* v. *Hogg*, *supra*; but here there was no such limitation. There was no hardship in the personal liability of a trustee, because he had always the option of raising a multiplepoinding. (2) In the circumstances of this case the trustee was not entitled to charge either the expenses which he had been found liable for or the expenses he had himself incurred against the estate before calculating the *jus relictæ*. He might or might not have relief against the beneficiaries in the trust, but the widow in this case was not a beneficiary but a successful adversary of the trust. She had been found entitled to expenses, but that decree would be nugatory if the trustee were entitled to exhaust the trust funds in paying these expenses. It was a general rule that when a claimant was successful in an action with a trustee the latter could not charge his expenses against the claimant's share of the trust estate—*Buttercase and Geddie's Trustees* v. *Geddie*, July 16, 1897, 24 R. 1128, 34 S.L.R. 844; *Easson's Trustees* v. *Mailer*, May 14, 1901, 3 F. 778, 38 S.L.R. 700.

Argued for the defender and respondent —(1) the respondent was not personally liable under the interlocutor of 23rd February 1900. No doubt the finding of expenses was there a general finding against the defender, but in construing a finding of that nature it must be read in the light of the conclusions of the summons. The only conclusion for expenses in the summons was for decree against the defender "as

trustee and executor foresaid." Any decree following on these conclusions, and expressed in general terms, was a decree against the defender *qua* trustee. (2) The whole expenses incurred were expenses of administration, and ought to be deducted from the estate before *jus relictæ* could be estimated. The circumstances made it perfectly proper in the trustee to defend the action; if so, the expenses were expenses of administering the estate, and were the first charge upon it—*Drummond* v. *Carse's Executor*, January 27, 1881, 8 R. 449, 18 S.L.R. 272. In defending the action he was saving the estate not only for the beneficiaries but for the widow herself, because the claim originally made by her would have swallowed up the whole estate and left nothing for *jus relictæ*. The defender therefore had saved the *jus relictæ*, and accordingly that fund ought to bear its share of the expenses.

LORD ADAM—The interlocutor which is submitted for review is that of March 1901. The only finding in that interlocutor which was brought under our notice is one by which the Lord Ordinary has found "that in a question with the pursuer as a widow claiming *jus relictæ* the defender is entitled to deduct the expenses which he has incurred in this action (including those in which he has been found liable to the pursuer) from the amount remaining in his hands after payment to the pursuer of" a certain sum.

The expenses here mentioned are expenses incurred in litigation in a previous part of this case. These expenses, so far as incurred in the Inner House, were disposed of by the interlocutor of 23rd February 1900 pronounced by this Division. By that interlocutor we found the defender liable to the pursuer in expenses since the date of the interlocutor reclaimed against, and remitted the account thereof to the Auditor to tax and to report to the Lord Ordinary. The expenses in the Outer House are disposed of in the interlocutor now under review, in which the Lord Ordinary "finds the pursuer entitled to expenses, reserving, however, the question whether the amount ought not to be modified."

These expenses for which the defender has been found liable to the pursuer the defender claims in substance to deduct from the pursuer's *jus relictæ*—at least to the extent of one-half—the other half being charged upon the share of the persons taking under the deceased's will. He also claims to deduct his own expenses. The claim formerly made was for certain property—shares, stocks, &c.—which the pursuer said belonged to her. They were mixed up with the estate of her deceased husband, and she said—"These shares, &c., are truly my estate; they were in my husband's hands, and before you can ascertain the amount of the estate these must be deducted and paid over to me." The answer to that was—"No; you made a donation of these to your husband during his life." And the amount of the estate depended upon whether there was donation or not. That was the question which was decided by the former litigation.

In the present reclaiming-note the first question raised was as to the meaning of the interlocutor by which we in February 1900 found the defender liable in expenses since the date of the interlocutor submitted for review. It was contended on behalf of the defender that looking to the proceedings in this case, that interlocutor laid the liability on the defender *qua* trustee only, and that if that was so he was not liable to make payment of these expenses except to the extent of the trust funds. Now, as a matter of construction, I think this a decree against the defender. It is not, in my view, a decree against the defender *qua* trustee. There is no finding to that effect. The defender is called in the action simply as Donald Anderson, residing in such a place, "sole remaining trustee acting under the trust-disposition and settlement and codicils thereto of the said deceased Alexander M'Glashan Anderson." The decree which we pronounced against him is a decree finding him liable as defender, and it humbly appears to me that upon a construction of these proceedings that is a decree against him, and not simply as trustee on the estate.

I agree with what Lord M'Laren says in *Craig* v. *Hogg*, and I think the rule is that any trustee who chooses to litigate is liable for the expenses incurred by his opponent, no matter what the amount of the trust-estate may be, in a question with his opponent. I quite agree with Lord M'Laren that if a trustee chooses to litigate with the authority of any or all of the beneficiaries, as he did in this case, it is for the trustee to look to them for his relief from the expenses which may be incurred. Accordingly, in this case it humbly appears to me that the defender was bound to make payment of these expenses whether the amount of the estate afforded them or not. In point of fact part of these expenses have actually been paid, and with the result that the defender says there will be a deficiency in the estate, and that in a question with his representatives he may not be able to recover his expenses from them. But however that may be, I think that under that decree formerly pronounced the defender was bound to make forthcoming the amount of these expenses, which is the question that has arisen in this case.

That question being settled, the next question that was raised in the case was, what amount is the widow entitled to? That, of course, makes it necessary to ascertain what was the amount of the estate left by her husband. She was entitled to one-half of that estate, and the two children of the defender were entitled to two-thirds of the other half, the other one-third going to the children of a niece. In settling the amount of the estate, after deducting the amount which it has been ascertained was estate of the pursuer in her husband's hands, some £3000 odd, there is left a certain amount, and what the defender proposes to do is this—from the amount of the husband's estate to deduct before

division the sum of expenses which he had previously paid to the pursuer, and besides that he proposes also to deduct from that estate the amount of the expenses which he himself incurred in that litigation. The result of that on the argument which was presented to us is that it in fact leaves no estate for division at all. So that if that operation which the defender proposes to carry out is carried out, and as the Lord Ordinary says, ought to be carried out, the pursuer will be made actually to pay the expenses which she has already been found entitled to, and the pursuer will also have to pay the defender's expenses in that same litigation in which he was unsuccessful. That is the practical result of this operation, whether it be right or wrong. I think the interlocutor of the Lord Ordinary is wrong. As I have said before, I think the defender here was bound to pay these expenses — was personally liable in a question with the pursuer. His personal liability in a question with his own constituents is an entirely different question, but he was personally liable, in my view, in a question with the pursuer, to pay that sum. What he now proposes to do is simply, it humbly appears to me to be, to make the pursuer pay it back, because he would retain such a share of the estate as would accomplish that. I do not think that that is right or consistent with the rights of the parties. I think that in this litigation it is a fallacy to say that the defender was defending the rights and interests of the whole of the parties who might have had the right to the estate. That was not the position of the defender here. He was defending the estate against one of the parties in the interests of his own children and the children of a niece. That was the true state of matters, and I think that in such a state of matters it is impossible to say that the expenses of that previous litigation should be deducted from the whole of the estate before division, because that is just making the pursuer pay the expenses of the litigation in which she was successful and was found entitled to expenses.

Accordingly, my view is that the proper way to dispose of this case is that the amount of the estate should be ascertained before division, and that after division into the two shares the pursuer is entitled to get her share of her husband's estate to which she has been found to be entitled, and that the children of the defender and the children of his niece are entitled to the other half, but subject to deduction of the expenses which were incurred in defending the estate against the claims of the other party, the widow, who was entitled to a share of it.

I think it is against all practice that in such a state of facts as this a party in the position of a trustee, who holds the estate for all concerned, should be entitled to say that he was defending the estate or managing the estate for the benefit of all concerned and that all concerned must equally pay the expenses. I do not think that is right. He was defending the estate, not for the benefit of all but of a part only, viz., those who had a right as representatives of the testator. He was defending the estate for them and against the widow, and I think that according to practice it is the proper way to dispose of this estate that before division the widow should get her half of the estate and the children the other half, subject to the deduction in their case of the expenses incurred. That there may not be enough of the estate left to pay those expenses is no concern of hers, and I think we should dispose of the case in the way I have suggested.

LORD M'LAREN—It has long been settled that in questions between trustees and persons who are not claiming under a trust, or identified with a trust, the trustees must fulfil their contracts, and discharge their liabilities on their own responsibility, and in consequence that they are not entitled to shelter themselves behind the trust estate, or to put forward the plea that they are only liable in their representative capacity. It is notable that in the last leading case in which that general question was raised—the case of *Muir* v. *City of Glasgow Bank*—the House of Lords, while affirming the principle of trustees' liability, carried it out logically by an award of costs against the trustees who brought the question before them. That of course did not in any way prejudge the claim that the trustees might have for relief against trust beneficiaries for the costs that they had been compelled to pay, any more than it would prejudice their relief against them for the claim that was the subject of the action. It seems to me to be impossible to draw a distinction between a trustee's liability for the expenses of a litigation and his liability under any other contract. That was the substance of the opinion which I expressed in the case of *Craig* v. *Hogg*, and I do not refer further to it.

When the case was formerly before the Inner House we found the trustee in general terms liable in expenses. I think the Court has always an equitable discretion in dealing with expenses, and there was nothing in the case to induce the Court to deviate from the ordinary rule, and in construing the interlocutor it seems to me to be a complete affirmance of the liability of the defender to indemnify the pursuer for her expenses. Now, if that was a just decision in regard to the expenses of the reclaiming-note, I think it follows that the liability must be exactly the same in regard to expenses in the Outer House. The state of the account which has been given in by the defender is an account rendered upon the supposition that the pursuer is a beneficiary under the trust and has to share along with the other beneficiaries the sum which will be required to indemnify the trustee for his expenses. I venture to say, with all respect to the Lord Ordinary's opinion, that that is not a correct view of the pursuer's position. She is not a beneficiary under the trust. She has repudiated her conventional provisions and claimed

jus relictæ. That is one branch of the action. In the other branch she is certainly claiming adversely to the trust, because she claims that certain shares, of considerable value, which were standing in her husband's name, were really her property. She was therefore claiming adversely to the rights of the others who were interested in the estate, and I think it would be inequitable and contrary to principle that she should be saddled with liability for a share of expenses incurred in litigating with herself, and I agree with your Lordship in the chair that these expenses are not a proper deduction from the whole head of the executry estate, but that the estate, undiminished by these expenses, is the divisible fund; and then the question will be whether the expenses are a deduction from the half of the fund which falls to Dr Anderson's representatives. One may see what the result of that will be, but as the beneficiaries are not here it is not necessary to pronounce any opinion as to whether they would be bound to submit to the deduction from their share.

LORD KINNEAR—I agree with your Lordships. We had a very ingenious argument to show that the costs of a litigation which has resulted, not in securing a benefit for the trust estate, but, at all events, in avoiding a greater loss to the trust estate than was originally threatened by the pursuer's action, are proper expenses of administration which, if the litigation were properly conducted, ought to fall upon all the persons interested in the estate. I think there are two very serious flaws in that argument. In the first place, I think that in so far as it depends upon any question as to the conduct or reasonableness of the litigation it comes too late. So far as the expenses which were incurred in the previous hearing in this Division are concerned, they are already disposed of by the interlocutor of this Division of 23rd February 1900; and in so far as the expenses of litigation otherwise—that is to say, the expenses in the Outer House—are concerned, they are disposed of by the interlocutor now under review, because the Lord Ordinary finds that the pursuer is entitled to expenses, reserving a question of modification. That means, I have no doubt, that the defender is liable to the pursuer in expenses, and that disposes, to my mind, of the whole question of expenses as between these two litigating parties. Whether the pursuer was altogether reasonable in her demand or not, or whether the defender's resistance to her action was on any ground justifiable or not, must have been considered by the Lord Ordinary when he pronounced that finding; and we are not asked to disturb the Lord Ordinary's decision. I take it, therefore, as quite settled that as between the parties to this action the defender is liable to the pursuer in the expenses incurred by her, and that the pursuer cannot be liable to any extent to recoup the defender for the expenses incurred by him.

The second fallacy which I think is to be found in the defender's argument is this—It is perfectly reasonable and just that so long as the litigation is conducted for the benefit of all parties interested in the estate for distribution, whether they are beneficiaries under a will, or widows, or children claiming an interest by law in the estate for distribution, such expense ought to be borne by them all. On the same principle, the same liability attaches to everybody so long as the persons in the administration of the estate are vindicating it for all the persons interested, but the moment that one of the persons who might have been so interested takes herself outside the general body and raises an action against the estate, the defender of such an action, and through him the other beneficiaries or creditors in the estate, are put into the position of competing litigants, and it is quite out of the question to say that the litigation which follows upon such an action is carried on for the common benefit. It is carried on for the benefit of the person who succeeds in it, and to the loss of the person who fails in it; and each party must bear his or her own share of the expenses in accordance with the rules of law applicable to such cases. It appears to me to be a manifest fallacy to say that the benefit which the defender says he has obtained for the estate by litigating with the pursuer is a benefit to the pursuer or a benefit to the whole estate at all. It is a benefit, if there be any benefit, to those beneficiaries on whose behalf he is litigating with the pursuer, and I think there is something quite untenable in the position which he now assumes when he says—"I must concede that you are entitled to your expenses, and that I have no claim for expenses against you, but I shall pay your expenses out of your share of the estate, and retain my own out of the same share." That is a practical contradiction of everything which the Court has found, both in the interlocutor of this Division in February last and in the interlocutor of the Lord Ordinary now under review. I therefore agree with your Lordships as to the proper way of disposing of this question.

The LORD PRESIDENT was absent.

The Court pronounced this interlocutor:—

"Recal the interlocutor of Lord Low dated 2nd March 1901: Decern and ordain the defender to make payment to the pursuer of the sum of £3458, 3s. 9d., with interest thereon at the rate of 5 per cent. per annum from 29th February 1896 till payment, but that under deduction of the sum of £2000 paid by the defender to account on 2nd August 1900, with interest on said last-mentioned sum from 2nd August 1900 at the foresaid rate: Find the defender liable in expenses in the Outer House, reserving, however, the question whether the amount ought not to be modified to be considered by the Lord Ordinary when the report of the Auditor is received; allow an account of said expenses to be given in, and remit the same, when

lodged to the Auditor to tax and to report: Find that in all questions with the pursuer under this action the defender is not entitled to deduct the expenses which he has incurred in this action or those in which he has been found liable to the pursuer from the trust estate of the deceased Dr Anderson; *Quoad ultra* reserve the defenders' right of relief against said estate; Find the defender liable in expenses since the date of the interlocutor reclaimed against, and remit," &c.

Counsel for the Pursuer and Reclaimer — Salvesen, K.C. — Clyde, K.C. — F. C. Thomson. Agents—J. & D. Smith Clark, W.S.

Counsel for the Defender and Respondent — W. Campbell, K.C. — Ingram. Agent — Thomas Henderson, W.S.

Friday, November 8.

FIRST DIVISION.

PARISH COUNCIL OF THE PARISH OF KEITH *v.* PARISH COUNCIL OF THE PARISH OF KIRKMICHAEL.

Poor — Settlement — Derivative Residential Settlement — Retention—Lunatic — Non-Residence—Poor Law (Scotland) Act 1898 (61 *and* 62 *Vict. cap.* 21), *sec.* 1.

A lunatic who had a derivative residential settlement, derived from her father, in the parish of K. continued for more than five years after his death to reside out of the parish of K. in an asylum, where she was maintaincd by a brother. At the end of that period she became chargeable as a pauper. *Held* in a special case between the parish of K. and the parish of her birth settlement that she had lost her settlement in the parish of K. by non-residence, and that her birth parish was liable.

Crawford and Petrie v. *Beattie*, 24 D. 357; and *Thomson* v. *Kidd and Beattie*, 9 R. 37, 19 S.L.R. 25, *followed.*

Elsie Gordon Grant, daughter of James Grant, was committed to the Royal Lunatic Asylum, Aberdeen, on 20th November 1885 as a private patient, and with the exception of two short intervals, viz., from 31st March 1893 to 20th April 1893, and from 29th May 1894 to 29th June 1894, during which she resided in family with her father James Grant, she continued to reside there as a private patient until 1st April 1900, when she was transferred to the pauper roll.

James Grant died in January 1895. His daughter Elsie was born on 19th March 1866 in the parish of Kirkmichael, in which her father James Grant resided for about two years after her birth She lived in family with her father until she was committed to the asylum in 1885. For the twenty-two years preceding his death her father resided in the parish of Keith, where he acquired a residential settlement which he possessed at his death. Until he died James Grant maintained his daughter in the Aberdeen Asylum, and after his death she was maintained there by her brother until 1st April 1900, when she became chargeable.

Questions having arisen as to what parish was liable for the pauper Elsie Grant, a special case was presented for the opinion of the Court of Session.

The parties to the special case were (1) the Parish of Keith, and (2) the Parish of Kirkmichael.

The first party maintained that on 1st April 1900, when Elsie Grant became a pauper, her settlement was in the parish of Kirkmichael as the parish of her birth; and the second party maintained that at that date she was chargeable to the parish of Keith, in respect of her having a derivative settlement in that parish through her father.

The questions of law were—"(1) Was the settlement of the pauper, the said Elsie Gordon Grant, in the parish of Keith, on 1st April 1900, when chargeability commenced, and is the parish of Keith bound to pay for her maintenance subsequent to that date? or (2) Was the settlement of the pauper, the said Elsie Gordon Grant, in the parish of Kirkmichael, on 1st April 1900, when chargeability commenced, and is the parish of Kirkmichael bound to pay for her maintenance subsequent to that date?"

Argued for the first party — The pauper had lost the residential settlement in the parish of Keith which she had derived from her father, because during a period of four years after his death she had not "resided in such parish continuously for at least one year and a day" — Poor Law (Scotland) Act 1898 (61 and 62 Vict. cap. 21), sec. 1. It was said that because the pauper was insane she was incapable of losing her derivative settlement. This proposition was supported by the decision in *Melville* v. *Flockhart*, December 19, 1857, 20 D. 342; but that case had been overruled by the Whole Court case of *Crawford and Petrie* v. *Beattie*, January 25, 1862, 24 D. 357. A lunatic who had acquired a residential settlement before becoming insane might by non-residence during insanity lose that settlement—*Thomson* v. *Kidd and Beattie*, October 28, 1881, 9 R. 37, 19 S.L.R. 25. The fact that the pauper's settlement was not acquired by herself but derived from her father made no difference — *Boyd* v. *Beattie and Dempster*, July 12, 1882, 9 R. 1091, Lord Young p. 1095, 19 S.L.R. 812; *Parish Council of Falkirk* v. *Parish Councils of Govan and Stirling*, June 12, 1900, 2 F. 998, Lord Kinnear, p. 1010, 37 S.L.R. 759—and the pauper's absence from the parish of Keith began to take effect to deprive her of her derivative settlement as soon as her father died — *Fraser* v. *Robertson*, June 5, 1867, 5 Macph. 819, Lord Cowan p. 822, 4 S.L.R. 74. The Lunacy (Scotland) Act 1857 (20 and 21 Vict. cap. 71), sec. 75, which provided that a pauper lunatic should be chargeable to the parish in which he had a settlement at the time of his reception into a district asylum, did not apply in the circumstances