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‘ performance on the part of the said George Lyell, in such manner as he shall be advised : And it is further ordered, that the cause be remitted back to the Court of Session, to review generally the interlocutors complained of, so far as the same are not hereby reversed or altered, and to do therein as shall be just, having special regard to this judgment.’

*Appellant's Authorities.*—(1.)—4. Dow, 341 ; 1. Espinasse, 233 ; 7. East. 335 ; 3. Campbell, 340.

J. CAMPBELL,—C. BERRY,—Solicitors.

(*Ap. Ca. No. 23.*)

No. 37.

THOMAS ARROL and Others, (JAMES SPADEN'S Trustees,) Appellants.—*Cranstoun—Fullerton.*

WALTER SPADEN, Respondent.—*Cockburn—More.*

*Recompense—Legacy.*—Circumstances in which it was held, (reversing the judgment of the Court of Session,)—1.—That there was no sufficient evidence of a claim made against the trustees of a defunct for recompense on account of labour, over and above wages paid during the life of the deceased ;—and,—2.—Affirming the judgment, that a legacy bequeathed by the defunct to the party so claiming recompense could not be imputed in extinction pro tanto of such claim, even if it had been duly established.

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2<sup>D</sup> DIVISION.  
Lord Pitmilley.

THE late James Spaden, builder in Edinburgh, was in the practice, from 1801, of employing Walter Spaden as his foreman or manager. In September 1808 James died, leaving a trust-deed in favour of Arrol, his mother, and others, by which he conveyed to them his whole effects, real and personal, for the purpose, ‘ Primo, To make payment, out of the first and readiest of my said means and estate, of all my just and lawful debts and funeral charges, and expense of management under the trust. Secundo, My said trustees, &c. shall proceed as soon as possible to convert my personal property into cash, and apply the same to payment of my debts as aforesaid ; and if the proceeds shall prove insufficient for that purpose, to sell and dispose of my heritable property, &c. Tertio, I hereby declare the said Mrs. Elizabeth Tulloch otherwise Spaden, my mother, to be my residuary disponee and legatary to my whole means and estate, heritable and moveable, after payment of my debts as aforesaid ; but under the burden always of the sum of £300 sterling to be paid to Walter Spaden, builder in Edinburgh, at the first term of Whitsunday or Martinmas after her the said Mrs. Elizabeth Tulloch's decease.’

Soon after the death of James Spaden, Walter claimed from

his trustees £39 : 13 : 8, being a debt of lent money and wages to himself and apprentices. This was paid; but subsequently he made an additional claim of upwards of £500, which was composed of sums which he alleged he had borrowed on behalf of and paid to James Spaden, and for which he had become responsible; and also of a certain share of profits, to which he stated he had right as partner of James Spaden in building speculations. This claim was submitted to arbiters; and, after some discussion, Walter gave up his demand for a share of the profits, but insisted that he was entitled to remuneration for extraordinary services which he had performed, over and above the wages which he had received as foreman of James Spaden. The arbiters expressed an opinion that Walter was entitled to an additional sum beyond what he had received, and they remitted to Mr. Robert Burn, architect, to state what the amount of that recompense should be. That gentleman reported that, after certain deductions, Walter was entitled to £382 : 9 : 9. The submission, however, having expired before any decree was pronounced, Walter brought an action concluding for this sum, and repayment of the borrowed money. This claim was disputed by the trustees, who alleged that there was not only no evidence in support of it, but that it was contradicted by the circumstance of Walter having been regularly paid his wages as a foreman,—by the terms in which the entries in the books and accounts of the parties were expressed,—by having originally limited his claim to £39 : 13 : 8, and having been paid that sum. The Lord Ordinary found that he was ‘entitled to claim an additional allowance for super-intending the business of the late James Spaden as a builder, from the year 1801 to the year 1808, beyond what he received from time to time from the said James Spaden while the building was going forward;’ fixed the amount at that reported by Mr. Burn, and decerned accordingly.

In the mean while the legacy of £300 had become payable in consequence of the death of Mrs. Spaden, and Walter thereupon brought a new action for payment of it. Against the above judgment the trustees represented, and contended, 1. That even if there were such a debt as that demanded, the legacy must be held to have been intended to extinguish it, or at least as a sufficient recompense for any services performed; and, 2. That both the debt and the legacy could not be found due.

The Lord Ordinary, after adhering to that part of his interlocutor finding that Walter was entitled to a recompense for the amount reported by Mr. Burn, found, ‘That the sum of £300 sterling which Mr. James Spaden bound his executors to pay to

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‘ the respondent, must be imputed in extinction pro tanto of the  
 ‘ debt, in respect the respondent had a legal claim for a remuner-  
 ‘ ation for his services against Mr. James Spaden, which consti-  
 ‘ tuted Mr. Spaden his debtor ; and this affords a legal presump-  
 ‘ tion that a donation over and above was not intended, and the  
 ‘ precise amount of the debt was not ascertained by any express  
 ‘ bargain ; so that Mr. James Spaden, although he appears to  
 ‘ have felt the obligation, could not exactly know the extent or  
 ‘ amount of it, and it is not said in the settlement that the £300  
 ‘ was meant as a pure gift or legacy.’

Walter having represented against this interlocutor, the Lord Ordinary found, ‘ That the clause in the settlement of Mr. James  
 ‘ Spaden, founded on by the representer, affords a presumption  
 ‘ that the deceased considered the representer to be entitled to a  
 ‘ remuneration for his services, over and above the wages which  
 ‘ had been paid to him, and also furnishes evidence of the amount  
 ‘ at which the deceased estimated the representer’s claim to such  
 ‘ remuneration ;—that, therefore, the clause in the settlement may  
 ‘ be considered as evidence in the representer’s favour in the  
 ‘ action in which he insists for payment of a sum of money as a  
 ‘ remuneration for his services ; but that it cannot be legally  
 ‘ inferred from the sum in the settlement, that the deceased James  
 ‘ Spaden intended to give a donation or legacy of £300 to the  
 ‘ representer, in addition to the payment of a debt,—the represent-  
 ‘ er’s claim to any payment on this score, as well as the amount  
 ‘ of the claim, having been only ascertained by legal process since  
 ‘ the death of Mr. James Spaden ;’ and therefore adhered to his  
 interlocutor, finding that it must be deducted.

Both parties having reclaimed, the Court adhered as to the amount of the recompense due to Walter, but found that he ‘ is  
 ‘ entitled to payment of the legacy bequeathed him, besides and  
 ‘ over and above the payment of the debt due to him,’ but that no expenses were due on this point of the case ; and to this interlocutor they afterwards adhered on the 14th of January 1819.\*

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\* See FAC. Coll. where it is said, ‘ Three of the Judges were of opinion that the  
 ‘ maxim, debitor non præsumitur donare, did not apply in this case, chiefly on the ground  
 ‘ that the deceased owed the petitioner a debt at his death, as had been now ascer-  
 ‘ tained by the Court ;—that a person could not intend to pay a debt by a legacy, payment  
 ‘ of which was postponed for an indefinite distant period ; and that the deceased spe-  
 ‘ cially directed that all his debts should be paid before this legacy.

‘ The remaining two Judges were of an opposite opinion, upon the ground that the  
 ‘ petitioner’s claim, although it had been subsequently ascertained by the Court to be a  
 ‘ legal debt, was more like a discretionary claim upon the testator’s generosity, than  
 ‘ a precise claim which could be enforced in a Court of Law ;—that it had not been  
 ‘ brought forward as a debt during the testator’s life ; and that, therefore, the legacy

The trustees then appealed against these judgments:—1. Be- July 5. 1822.  
cause there was no sufficient evidence of the claim for recompense,  
and of the cash advances made by Walter; and, 2. Because, at  
all events, the legal maxim, debitor non præsumitur donare, was  
peculiarly applicable; and therefore the legacy of £300 must  
either be held to have been intended to discharge any such  
claim, or at least to form a deduction from it. To this it was  
answered, 1. That there was sufficient evidence of the debt which  
was claimed; and, 2. That the legal maxim founded on could not  
apply to such a case as the present, because, independent of every  
other circumstance, the debt and the legacy were not of equal  
amount;—that the latter was not to be payable till after the death  
of Mrs. Spaden, a period which was perfectly indefinite;—that it  
was payable only after all debts were discharged; and that it was  
evidently intended as a mere gratuity, not as a satisfaction of  
debt, seeing that it was bequeathed to himself personally, and not  
to his executors, so that, by his predecease, it might have lapsed.

The House of Lords found, ‘ That in the action brought by the  
‘ respondent against the deceased Elizabeth Tulloch, otherwise  
‘ Spaden, for payment of any debt claimed by him as then re-  
‘ maining due to him from the said James Spaden, there is no  
‘ sufficient evidence that the respondent is entitled to claim any  
‘ additional allowance for superintending the business of the late  
‘ James Spaden as a builder, or for his apprentices, or for cash  
‘ advanced by him, beyond what he had actually received, as  
‘ claimed by the respondent in the said action: But the Lords  
‘ declare, that if any such debt had remained due to the respond-  
‘ ent, there is no sufficient ground for finding that the sum of  
‘ £300 sterling, which the said James Spaden bound his executors  
‘ to pay to the respondent, ought to be imputed in extinction  
‘ pro tanto of any debt due from the said James Spaden, at the  
‘ time of his death, to the respondent: It is therefore ordered  
‘ and adjudged, that the interlocutors complained of, so far as the  
‘ same find that the respondent is entitled to any such allowances as  
‘ aforesaid, and as the same repel the defences pleaded by the de-  
‘ fenders in the first action brought by the respondent, and discern  
‘ in terms of the libel, be reversed: And the Lords find that the  
‘ respondent is not entitled to expenses in the said action, and al-

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‘ must be held to have been intended to discharge that claim, and therefore ought not  
‘ to be paid in addition to legal satisfaction of the claim.’ And thereafter, ‘ Upon ad-  
‘ vising a reclaiming petition, four of the Judges approved of the interlocutor of the  
‘ Court upon the ground which had formerly weighed with the majority, and the re-  
‘ maining Judges disapproved of it upon the grounds which had influenced the mino-  
‘ rity.’

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 ' are founded on the assertion that the said legacy or sum of £300  
 ' ought to be imputed in extinction pro tanto of any debt due  
 ' from the said James Spaden, at the time of his death, to the  
 ' respondent, and assolzie the appellants as defenders in the said  
 ' action, but find no expenses due for litigation between the  
 ' parties on this point: And in respect of the second action brought  
 ' by the appellants for payment of the said legacy or sum of  
 ' £300, it is further ordered and adjudged, that the interlocutors  
 ' complained of, so far as the same find that the respondent was  
 ' entitled to payment of the said legacy or sum of £300, besides  
 ' and over and above any debt due to him at the time of the  
 ' death of the said James Spaden, and as find that no expenses  
 ' were due for litigation between the parties on this point, be af-  
 ' firmed.'

*Appellant's Authorities.*—(2.)—4. Stair, 45. 17; 3. Ersk. 3. 93; Innes, Dec. 1783, (11464); Davidson, June 25. 1706, (6966); Fleming, Nov. 19. 1661, (8260); Houston, Nov. 16. 1708, (11465); Greig, Feb. 19. 1768, (11454).

*Respondent's Authorities.*—(2.)—4. Stair, 45. 17; 1. Stair, 6. 2; 2. Stair, 42. 21; 1. Bank. 9. 26; 3. Ersk. 3. 93; 1. Masc. de Prob. 199; 2. Minoch de Præsum. 352. 362; 10. Mant. de Conj.; 2. Toller on Ex. 336; 2. Fonbl. on Eq. 322; 1. P. Williams, 408; 3. Atk. 68; 2. Atk. 300; 3. Atk. 97; 3. Ves. jun. 466; Cruickshank, June 16. 1665, (11489); Dickson, Dec. 5. 1671, (11490.)

J. RICHARDSON,—J. CAMPBELL,—Solicitors.

(*Ap. Ca. No. 25.*)