

Counsel for the Complainer—Jameson—Clyde. Agents—Strathern & Blair, W.S.
Counsel for the Respondents—Shaw, Q.C.—Graham Stewart. Agents—Turnbull & Herdman, W.S.

Thursday, January 7.

SECOND DIVISION.

CARRUTHERS v. CARRUTHERS' TRUSTEES.

(NOTE FOR FINLAY & WILSON, S.S.C.)

(*Ante* vol. xxxii. p. 587, and 22 R. 775, and in the House of Lords, vol. xxxiii. p. 809.)

Agent and Client—Expenses—Charging Order—Law-Agents and Notaries Public (Scotland) Act 1891 (54 and 55 Vict. cap. 30), sec. 6.

The Law-Agents and Notaries Public (Scotland) Act 1891, section 6, enacts that where a law-agent has been employed to pursue or defend an action, the Court before whom such action has been heard may declare the law-agent entitled "to a charge upon and against, and to payment out of, the property . . . recovered or preserved on behalf of his client by such law-agent in such action . . . for his expenses."

In an action at the instance of a liferentrix against the trustees on a trust estate, the trustees were ordained to pay a certain sum into the trust-estate to replace the amount lost through their breach of trust. Owing to debts still outstanding, and preferable to her claim, the pursuer could not for some time, and possibly might never, take any benefit from the decree in the action. Her law-agents craved a charging order on the sum recovered in the action, for an extra-judicial account greater in amount than the whole sum decerned for. The Court refused to grant the order craved, (1) *per* the Lord Justice-Clerk, Lords Young and Trayner (Lord Moncreiff reserving his opinion), on the ground that the pursuer's interest in the fund recovered was not such as to bring the case within the terms of the statute; and (2) *per curiam*, on the ground that even if the statute applied, this was not a case where, in the exercise of their discretion, the Court ought to grant such an order.

This was a sequel to the case of *Carruthers v. Carruthers' Trustees*, reported *ante ut supra*.

The question raised by this note was, whether the pursuer's law-agents were entitled to a charging order under the Law-Agents and Notaries Public (Scotland) Act 1891, section 6, against the sum recovered in the action.

On 4th December 1896 the pursuer presented a petition to the Second Division of

the Court of Session, praying the Court to apply the judgment of the House of Lords, whereupon the Court on 9th December pronounced the following interlocutor.—

"Having considered the petition, 274 of process, apply the judgment of the House of Lords of date 13th July 1896, and in respect thereof decern against the defender William Carruthers and James Glegg as individuals, and Ann Forbes or Forbes as executrix of the deceased Hector Forbes, and as such representing him as an individual, and that all conjunctly and severally for payment to the defender William Carruthers as remaining trustee under the trust-disposition and deed of settlement of the deceased David Carruthers mentioned in the petition, that the same may be applied along with the rest of the trust-estate in terms and for the purposes of the said trust-disposition and deed of settlement, of the sum of £104, 2s. 7d., sterling with interest thereon at the rate of £4 per centum per annum from and after the 31st day of January 1891, and until payment: Find the petitioner (pursuer) entitled to the expenses incurred by her in the Inner House, and the expenses of the petition: Remit," &c.

Thereafter Messrs Finlay & Wilson, S.S.C., Edinburgh, the pursuer's agents, presented a note to the Lord Justice-Clerk in which the above interlocutor was set forth, and his Lordship was craved to move their Lordships of the Second Division to declare the said Finlay & Wilson entitled to a charge upon, and against, and a right to payment out of, said sum of £104, 2s. 7d. and interest, for the taxed expenses incurred by the pursuer to said Finlay & Wilson in connection with said action, in so far as the same should not be recovered under the award of expenses already made as aforesaid by his Lordship's Division, and to remit the account of their expenses so to be charged to the Auditor to tax and report, and thereafter to approve of said report, and to decern against the said William Carruthers as remaining trustee aforesaid for payment to the said Finlay & Wilson of the said sum of £104, 2s. 7d. and interest thereon, so far as required for payment of the taxed amount of such expenses remaining after deduction of any sum recovered as aforesaid, the said sum of £104, 2s. 7d. and interest thereon being first received by the said William Carruthers as remaining trustee aforesaid, or to do further or otherwise in the premises as to their Lordships should seem proper.

The Law-Agents and Notaries Public (Scotland) Act 1891 (54 and 55 Vict. cap. 30), section 6, enacts as follows:—"In every case in which a law-agent shall be employed to pursue or defend any action or proceeding in any court, it shall be lawful for the court or judge before whom any such action or proceeding has been heard or shall be depending, to declare such law-agent entitled to a charge upon and against, and a right to payment out of, the property of whatsoever nature, tenure, or kind the same may be, which shall have been recovered or preserved on behalf of his client

by such law-agent in such action or proceeding, for the taxed expenses of or in reference to such action or proceeding, and it shall be lawful for such court or judge to make such order or orders for taxation of, and for raising and payment of, such expenses out of the said property as to such court or judge shall appear just and proper; and all acts done or deeds granted by the client after the date of the declaration, except acts or deeds in favour of a *bona fide* purchaser, shall be absolutely void and of no effect as against such charge or right."

The account for which Messrs Finlay & Wilson craved a charging order considerably exceeded in amount the sum of £104, 2s. 7d., for which decree had been obtained in the action.

The whole of the income of the trust-estate under the charge of the defender William Carruthers as trustee was employed in paying off debt, principal and interest. The revenue in the meantime was more than sufficient to pay the interest on the debts still outstanding, but the balance was used by the trustees to pay off principal. It was not disputed that this was a proper application of revenue. In the event of the debt being reduced at the same rate as at the date of presenting the present note, it was calculated by the pursuer's law-agents that the estate would be free of debt, and the income would be available for the benefit of the pursuer, the liferentrix, in about five years from that date; but, on the other hand, in the event—quite possible in the circumstances—of the creditors taking steps for the immediate payment of the principal sums due, or in the event of the pursuer's death before the expiry of the five years, she might never take any benefit from the present action, and in the meantime, until the estate was cleared of debt, she could take no benefit from it whatever.

Argued for the law-agents—The sum against which the law-agents craved an order was property recovered in the action. In England, under the corresponding statute—Solicitors Act 1860 (23 and 24 Vict. cap. 127), section 28—it had been held that the property, if recovered in the action, need not necessarily have been recovered solely on behalf of the solicitor's own client, if the persons for whom it had been recovered adopted the benefit obtained by the proceedings, and that the solicitor's claim was of the nature of salvage—*Greer v. Young* (1882), 24 Ch. D. 545, *esp. per* Bowen, L.-J. at p. 556; and *Scholey v. Peck* [1893], 1 Ch. 709. It was true that the words "on behalf of his client," did not occur in the English Act, but in this case that did not make any difference, because it was not disputed that the pursuer had a title to sue, and the property had been recovered at least indirectly on her behalf, for it would enable debt to be paid off sooner, and so make it possible to pay her liferent at an earlier date than would have been otherwise possible. If it were held that the statute was not applicable to such a case as the present, then no law-agent

acting for a liferenter could ever take benefit from its provisions. The analogy of salvage was sound, even where the amount of the account exceeded the sum decerned for, as the Court might in their discretion give an order for part of the taxed account only.

Argued for the trustee—The statute did not apply to this case. The sum decerned for was not property "recovered or preserved on behalf of their client" by the pursuer's law-agents. It had been recovered on behalf of the trustee, and through him for the creditors. It was at least doubtful whether the pursuer would ever take any benefit from the decree, and in any case she was only entitled under it to a liferent of £104. The words "on behalf of his client," did not occur in the English Act, and therefore the cases cited were not in point. Moreover, they could be distinguished from the present, because in both the client took some immediate benefit. It was further submitted that these decisions were erroneous. The analogy of salvage was unsound, for a salvage claim must always be less than the value of the property salvaged, whereas a law-agent's account was often, as in this case, in excess of it. The true purpose of the statute was to prevent the client dealing with property recovered or preserved in an action to the prejudice of his law-agent. In any view this was not a case in which the Court, in the exercise of the discretion they had under the Act, ought to grant the order craved.

At advising—

LORD JUSTICE-CLERK—I think the terms of the clause of the Act of Parliament founded on indicate two sets of circumstances in which a law-agent will be entitled to a charging order. On the one hand he may have been acting for the pursuer, and may have recovered the property or sum sued for, or, on the other hand, he may have been acting for a defender, and may have "preserved" for his client a property or sum which the pursuer sought to take from him. In these cases the Act says—[his Lordship quoted the section]. Now the particular one of these alternatives which the law-agents here maintain they come under is "recovery." The lady for whom they acted was the pursuer of this action. We have to consider whether anything has been recovered by them on behalf of their client. It is plain that here there has been no such recovery on behalf of their client. The sum of money for which decree has been obtained is a sum which the trustees had suffered by their negligence to be lost to the trust-estate through their factor absconding with it. It has been decided by the House of Lords that the trustees are bound to replace that sum in the trust-estate. They have not been ordained to pay anything to the pursuer. It does not seem to me that anything has been recovered on behalf of the client here. The debts against the trust-estate are such that a considerable period must elapse during which nothing will be payable to her. It

may be that nothing will ever be payable.

We have been referred to some cases decided in England upon the corresponding English statute. There is a difference between the English and the Scottish Acts of Parliament, and it is therefore questionable whether these decisions are applicable. But even if there had been no such difference it would not alter my view. In the cases quoted the plaintiff had an immediate right to something in consequence of the decree obtained. I think the illustration of salvage given in these cases is inappropriate. It does not seem a sound view that the costs are of the nature of a salvage payment. As was pointed out by Lord Trayner in the course of the discussion, salvage is a payment for the saving of property, and it is always less in amount than the value of the property saved. The word "salvage" does not apply to the case of a claim by which the whole fund may be carried off, as indeed would be the case here if the charging order were granted.

On the whole matter I think the prayer of the note should be refused.

LORD YOUNG—This is a case certainly not without general interest. This note has been presented to us under an Act of Parliament (54 and 55 Vict. cap. 30), section 6—[*His Lordship quoted the section*]. The law-agent here had as his client the pursuer of an action against trustees personally for payment of a sum which an absconding trustee, who also acted as factor to the trust, had gone off with. The sum upon which a charge is asked is £104, 2s. 7d. The interlocutor pronounced by this Court in pursuance of an order of the House of Lords was as follows—[*His Lordship quoted the interlocutor of 5th December 1896*]. So we are asked to say that money in the hands of the trustee of David Carruthers in terms of that decree is to be charged with this account of expenses incurred by the pursuer of this action, to whom nothing has been ordered to be paid at all. I am not prepared as matter of law to say that the money paid by the defenders under this order is money "recovered or preserved on behalf of the client" of this applicant. I am not prepared to affirm that. Indeed, I am inclined to think it is not so. It is not doubtful that their client may never get anything in consequence of this decree at all.

But, apart from that, as matter of discretion—and under this section we have full discretion—I am not prepared to grant a charging order. A case may be figured in which a law-agent would have a strong equitable claim to such an order. If, for instance, ten thousand pounds had been recovered for behoof of various parties not all clients of the law-agent, he might very reasonably ask for an order for payment of his account out of the sum recovered. It is easy to conceive of cases in which, although the whole sum is by no means recovered on behalf of his client only, the law-agent might have an irresistible claim for payment of his account out of the fund recovered,

In this case, however, I am of opinion

that even if it could be predicated that this sum had been recovered on behalf of this applicant's client, this is not a case in which we ought, in the exercise of our discretion under the statute, to grant the order craved.

LORD TRAYNER—I am of opinion that this application does not disclose a case falling within the terms of section 6 of the Law-Agents and Notaries-Public Act 1891. Further, I am of opinion that, assuming the case to fall within the provisions of that section, it is not one in which we ought, in the exercise of our discretion, to grant the charging order craved.

LORD MONCREIFF—I do not differ from the result at which your Lordships have arrived. I think that in this case there are special circumstances which make it right that the application should, as matter of discretion, be refused. The sum recovered is not large, and the law-agents' account is larger than the sum recovered. It is not clear that there will, as the result of the decree obtained in this action, be anything available for the pursuer. The creditors claim the whole estate, and it may be that their claims will absorb it all. Now, the Court has a discretion, and, looking to the whole circumstances, I do not think that this is a case in which we ought, in the exercise of that discretion, to grant a charging order *in hoc statu*. I go no further.

In regard to the construction of section 6 of the Act, I prefer to reserve my opinion. It might be too narrow an interpretation to say that in no case can a charging order be given except upon a sum recovered or preserved solely for the applicant's client. There might be cases in which the law-agent would be entitled to a charging order upon a fund, although that fund had not been recovered only for his own client, or although his client's interest in it might be contingent. I prefer to reserve my opinion on these points, and refuse the application simply in the exercise of our discretion.

The Court refused the prayer of the note, found the pursuer's agents liable in the expenses of the discussion, and modified the same at £3, 3s., and decerned.

Counsel for the Pursuer's Law-Agents—A. S. D. Thomson. Agent—Party.

Counsel for the Defender William Carruthers, the Trustee—Craigie. Agents—Mackenzie & Black, W.S.