Trustees v. *Neilson's Trustees*, November 17, 1883, 11 R. 119, 21 S.L.R 94; *Paterson* v. *Paterson*, November 30, 1897, 25 R. 144, 35 S.L.R. 150. In the present case it was clearly proved that the money for which the bankrupt had granted a receipt was the bankrupt's own. Further, the case did not fall within the decisions of *Thomson, supra*, and *Coutts' Trustees, supra*, because the payment in this case was not made to satisfy a debt. The case of *Shaw's Trustee* v. *Stewart and Bisset*, November 15, 1887, 15 R. 32, 25 S.L.R. 38, showed that there might be exceptions to the general rule that a payment in cash might be made by an insolvent debtor while still in the administration of his estate for debts due by him. The present case was an exception to the rule.

Counsel for the defenders and respondents were not called on.

LORD JUSTICE-CLERK—In the course of Mr Younger's argument I do not think anything has been brought forward which shows that this case is distinguishable from those cases which have already been decided upon the point.

In the present case the fact is not disputed that the receipts were given for the money at a time when the bankrupt was quite solvent. That being so, if prior to his bankruptcy he chose to pay off the obligations in cash I do not think that it is a matter with which the Court will interfere. There is no doubt a certain anomaly in the law in the matter, but it has been satisfactorily decided that if a man, even if he knows that he is insolvent, but yet being in the administration of his estate, pays in cash a debt due to one of his creditors, that payment is not struck at by the law.

LORD YOUNG—I think the facts in this case are in substance these—I may state them almost in a sentence—that this gentleman was under the honest belief—the feeling—that in all honour it was his duty to pay this sum of £200 to his daughters. I think, whether he ever gave his mind to the question whether the law obliged him, or a court of law would interpose to compel him to pay to the daughters, he had a feeling that he was in honour bound to do it; and regarding it as a gift, I think he not only made the gift, looking to the receipts and to the evidence of the circumstances under which they were granted, but he also fulfilled it and implemented it. It is a rule of law, in my opinion, which I am prepared to act upon, that while this Court will not interpose to compel the fulfilment of a gift, it will, on the other hand, certainly sustain a gift if fulfilled, and protect the recipient in the possession. Now, I think the gift was fulfilled here by giving it at the date when these receipts were granted to the daughters without going through the operation of handing their money to them and taking it back on a receipt given by him to show it. I think it is established that the gift, which he made according to a feeling of duty, with which I entirely sympathise, was fulfilled. I am therefore of opinion that the judgment of the Lord Ordinary is well founded.

LORD TRAYNER—I concur. I think the Lord Ordinary has stated correctly what is the result of the transaction between the bankrupt and his daughters. He says that by granting them the receipts "he constituted the sums in question as loans by his daughters to him duly vouched, the basis of the transaction being no doubt remuneratory donation, but the effect being to make his daughters his creditors, so that at any time they might have demanded payment." This view is in accordance with the cases of *Thomson* v. *Geikie*, 23 D. 693, and *Christie's Trustees* v. *Muirhead*, 8 Macph. 461. Accordingly the only remaining question is, whether the obligation constituted and proved by the receipts was fulfilled in such a way as to be unchallengeable under the statute. I think it was because it was a payment in cash. No doubt the bankrupt at the time of payment was in insolvent circumstances, which I think the daughters knew. But still that does not invalidate a payment in cash made by the bankrupt to a duly constituted creditor who is in a position to demand payment of his debt. On these grounds I concur with the Lord Ordinary.

LORD MONCREIFF was absent.

The Court adhered.

Counsel for the Pursuer and Reclaimer—H. Johnston, K.C.—Younger. Agents—Morton, Smart, Macdonald, & Prosser, W.S.

Counsel for the Defenders and Respondents—Wilson, K.C.—Steedman. Agents—Steedman & Ramage, W.S.

Wednesday, March 4.

SECOND DIVISION.

[Sheriff Court at Stirling.

AITKEN *v.* GOURLAY.

Title to Sue—Action by Mother for Death of Legitimate Child—Father Divorced for Desertion, and Whereabouts Unknown—Onus—Presumption of Life—Husband and Wife—Parent and Child—Reparation.

A woman whose husband had been divorced for desertion brought an action of damages for the death of their child. She averred that she did not know where the father was, or whether he was dead or alive, and that she had supported herself and her children without any assistance from him since he deserted her about five years before. *Held* that the father must be presumed to be alive, and (*diss.* Lord Young) that while the father was in life the mother had no title to sue.

Mrs Janet Brand or Aitken raised an action in the Sheriff Court at Stirling against William Gourlay, builder, 13 Forth Crescent, Stirling, and Thomas M'Nab, joiner, Friar Street there, to recover damages for the death of her child James Brand Aitken, aged five years and five months, who was killed by an accident for which the pursuer alleged the defenders were responsible.

The pursuer averred—"(Cond. 1) The pursuer resides at 6 Viewfield Place, Stirling, along with her family, which at the date of the accident after mentioned consisted of three boys and a girl. One of said boys died as the direct result of said accident, and another from shock as a result of his brother's death. The surviving girl and boy are aged respectively fourteen and twelve years. By decree of the Court of Session of 18th January 1902 the pursuer obtained divorce against Thomas Aitken, who was her husband, and also custody of the children of the marriage, and in particular of, *inter alia*, James Brand Aitken after mentioned. The said Thomas Aitken deserted the pursuer about five years ago, and she has no knowledge of where he is, and she does not know whether he is dead or alive. The pursuer has been the sole means of support of her children since her husband deserted her, both prior to and subsequent to the divorce."

The pursuer pleaded—"(1) The pursuer's said child James Brand Aitken having been deprived of life through the fault and negligence of the defenders, or of those for whom they are responsible, the pursuer is entitled to damages and solatium from the defenders therefor, with expenses."

Separate defences were lodged for Gourlay and M'Nab, and each of the defenders pleaded "No title to sue."

On 12th June 1902 the Sheriff-Substitute (BUNTINE) sustained the pleas of no title to sue, and dismissed the action.

Note.—"This is an action of damages brought by a mother against two parties whose negligence she avers was the cause of the death of her son.

"It is admitted that the pursuer obtained a decree of divorce on the ground of desertion in January of this year. She states that she does not know whether her former husband is dead or alive. I must therefore assume that the father of this child is still alive. If that be so, then he is the person who has the primary right to recover damages for the death of his son.

"That right is founded on the mutual obligation to aliment which exists between father and child. See *Eiston*, 8 Macph. 980.

"That obligation does not cease by the divorce of the father. See the case of *Foxwell*, 2 F. 932, where a divorced father was held primarily liable for the aliment of his child.

"It is, I think, clearly settled that the right of an action like the present cannot exist in two persons at the same time for the same injury. See *Darling*, L.R. 1892, App. Cases, 576, and the opinion of Lord M'Laren in the case of *Whitehead*, 20 R. 1049. That right of action remains with the father of a child while he lives, even after divorce, just as the obligation on the child to aliment his father is not removed by the divorce of his parents.

"If, however, the father were to renounce his right of action, or if the pursuer could prove that he was dead, then I think that she would have a good title to sue. I have accordingly dismissed the present action instead of granting absolvitor to the defenders."

On appeal the Sheriff (LEES) by interlocutor dated 12th August 1902, adhered to the interlocutor of the Sheriff-Substitute.

Note.—"I concur throughout in the opinion of the Sheriff-Substitute. I was favoured with an able argument on the question of relevancy; but it would be improper to express any opinion on the point if the pursuer has no title to bring the action before the Court. And I agree with the learned Sheriff-Substitute that she has no title to sue.

"It is not doubtful that in the ordinary case a married woman has no title to sue an action for the death of her child if her husband is alive and has not renounced his right to sue or assigned it to her. But in the present case the pursuer is not quite in the ordinary position. She was granted decree of divorce from her husband in January last on the ground of desertion, and she contends that this gives her a title to sue, especially as the custody of the children was given to her. Or, she says, at anyrate it gives her a right to sue if her husband is not alive, and that it is for the defenders to prove that he is alive.

"I am unable to agree with either of these propositions. The decree granted did not affect the reciprocal relations and obligations of the father and his children, even if their custody was taken from him. If need be, he would have to support them or they him; and the law of succession to property obtaining between them would not be affected by the decree of divorce.

"The decree of divorce therefore does not, in my opinion, confer a title to sue on the pursuer, or indeed affect the matter at issue. If the father is alive he has the title to sue, if he is dead it does not matter whether he was divorced or not.

"The next question is, on whom is the onus of proving the death of the pursuer's husband? The circumstances of the case do not yield any presumption of his death. Nothing is said of the husband's age, and the length of his disappearance would not yield any presumption of his death even under the Presumption of Life Act. The decree of divorce may be said to assume that he was then alive. Decree of divorce would not be granted against a deceased husband.

"On whom then does the onus rest of proving that the pursuer's husband is dead? I think it rests on her. If under a contract or a delict a right arises in favour of A and B, and B's right emerges only on the failure of A, it is plain that it is for B to prove that his conditional institution has emerged by the failure of A. That is just the position in the present case, and the pursuer

does not aver that her husband is dead or ask to prove it. All that she says is that she does not know whether he is alive or dead, and to prove this state of knowledge on her part will not improve her position.

"I think, therefore, that the plea of no title to sue has been rightly sustained."

The pursuer appealed to the Court of Session, and argued—By reason of her husband's desertion, and his whereabouts being unknown to her, the pursuer, who was maintaining herself and her family, was entitled to insist in the present action as in her own right—*M'Kenzie* v. *Ewing*, November 19, 1830, 9 S. 31; *M'Quillan* v. *Smith*, January 15, 1892, 19 R. 375, 29 S.L.R. 315. The mutual obligation to support, and nearness of relationship between a mother and her legitimate children gave the pursuer a good title to sue—Ersk. i. 6, 56; Bell's Prin. 1633; *Clarke* v. *Carfin Coal Company*, July 27, 1891, 18 R. (H.L.) 63, 28 S.L.R. 950; *Weir* v. *Coltness Iron Company, Limited*, March 16, 1889, 16 R. 614, 26 S.L.R. 470. The pursuer was no longer the wife of the deceased child's father—*Whitehead* v. *Blaik*, July 20, 1893, 20 R. 1045, Lord Adam, p. 1049, 30 S.L.R. 916—and at least she would be entitled to sue if she called the father as a defender—*Pollok* v. *Workman*, January 9, 1900, 2 F. 354, 37 S.L.R. 270. The result of the judgment appealed against was that the pursuer could have no remedy for loss and injury which were hers alone.

Argued for the respondents—The present action was unprecedented. A father's desertion did not affect the mutual obligation of support between him and his children, and therefore the sole title to sue the present action was in the child's father—*Eisten* v. *North British Railway Company*, July 13, 1870, 8 Macph. 980, Lord President, p. 984, 7 S.L.R. 638; the mother's action was therefore incompetent—*Darling* v. *Gray & Sons*, July 14, 1891, 18 R. 1164, 28 S.L.R. 872, *aff.*, 19 R. (H.L.) 31, 29 S.L.R. 910; *Whitehead* v. *Blaik*, *cit. sup.* Divorce did not affect the rights and obligations between a father and his children—*Foxwell* v. *Robertson*, May 31, 1900, 2 F. 932, 37 S.L.R. 726.

At advising—

LORD JUSTICE-CLERK—The question in this case is whether a wife who has been deserted by her husband, who has divorced him, is entitled to sue as in her own right for damages for an injury done to a child. It cannot be maintained and was not maintained that the circumstances gave any ground for presumption that the father of the child is no longer in life. In these circumstances I am of opinion that no right exists in the pursuer to maintain the action. The grounds for that view are so well expressed in the opinions in the Court below that I feel I can add nothing with any advantage. I would move your Lordships to affirm the judgment of the Sheriff.

LORD YOUNG—This case presents a novel question, which has never been in terms decided, although there is at least a decision which recognises the view that a father who is in wilful and malicious desertion of his family has not the rights of the head of the family.

The objection which your Lordship is for sustaining here, on grounds very clearly expressed by the learned Sheriff, is that the pursuer has no title to sue. Now, observe the circumstances in which the action is brought, and by whom. The wife and children are wilfully and maliciously deserted by the head of the family. The child who was killed was only five years old, and the father had been in desertion for five years, and had left his children destitute with their mother's industry as their only means of support. The question would have been precisely the same had the child been so injured as to be a cripple for life, deserted by his father, to be supported for life by the industry of his mother. I assume that there would have been a relevant ground of action at the instance of the mother who had to support her cripple child, her husband being divorced for wilful and malicious desertion. Although that divorce affects the rights of the husband and wife, yet they remain the father and mother of their children, and it is objected that the mother has no title to sue such an action as the present, the father being in life. Is there any law to the effect that he alone can sue for damages, although the damage is to the mother? If there is, it is common law, not statute law. It has been held that a deserting husband may lose his rights as head of the family. It was so held in a case of slander. While the husband is head of the family he alone has the right to sue for the slander of his wife, but it was held in the case of *Cullen* v. *Ewing*, November 19, 1830, 9 S. 31, that the wife herself had the right to sue for slander, her husband being in wilful and malicious desertion. Now here the injury is done to the child to the damage of the mother, whose duty to the child is not destroyed by the desertion of her husband—the burden of it is increased—and she sues the wrongdoer for damages. He maintains that the pursuer's husband, the child's father, who is in malicious desertion, alone has a title to sue. Now I think there is no authority whatever for the law which your Lordship says is well and clearly stated by the Sheriff. If the father is neglecting his duties and obligations as head of the family I do not think he or any other can plead his rights as such to maintain that the injured mother has no title to sue for this injury, because the right to do so is in the husband. Such desertion as is averred here, namely, desertion by a father of his pupil children, is by statute made a punishable crime, punishable by imprisonment and hard labour, which may be repeated as often as the crime is committed. Such desertion does not relieve a father of any of his obligations; my opinion is based solely on the ground that his rights cannot be pleaded. I am therefore of opinion that the objection to the title to sue ought to be repelled, and the mother allowed to prove what she has averred, and to show the extent of her injury or damage.

LORD TRAYNER—I think the conclusion of the Sheriff is right as our law now stands, and that the appeal should be dismissed.

LORD MONCREIFF—I think the Sheriffs are right. This is an action for *solatium* brought by a mother in respect of the death of her child, who was only five years of age. The father of the child must be presumed to be alive. The pursuer obtained decree of divorce from him as recently as 18th January 1902 on the ground of desertion. She avers that since his disappearance about five years ago she has been the sole means of support of her children, and that she does not know whether he is alive or dead. In these circumstances she maintains that she is entitled to sue this action in her own name. It is perhaps superfluous to say that the case as stated calls for sympathy, and equally superfluous that it cannot be decided on considerations of hardship or sympathy. Hardship even in a greater degree, patrimonial loss being added to wounded feelings, existed in many of the cases cited to us, notably in *Eisten* and *Whitehead*.

It was observed during the discussion that the case is unprecedented. Certainly the claim is unprecedented, and it is mainly that circumstance which in my opinion prevents us from sustaining the pursuer's title to sue.

Judicial opinion frequently and strongly expressed is against extending this class of actions, "unless they can be justified on some principle which has already been established." The same tendency of opinion militates equally against novel developments, such as sustaining for the first time a title to sue, even although the pursuer of the action might in other circumstances have had a good title to sue according to established practice—Lord President Inglis in *Eisten*, 8 Macph. 984; Lord Watson in *Darling*, 19 R. (H.L.) 31; and Lord President (Robertson) in *Whitehead*, 20 R. 1048. We therefore approach the question with a presumption against the pursuer's title, and not as when dealing with an enabling statute with a predisposition towards a liberal construction.

I do not understand that it is maintained that if the marriage had still subsisted the pursuer would have had a title to sue. It is quite settled that there can only be one such action, and that the husband and father has the sole title to sue it, unless he renounces or assigns his right. He sues in his own name alone. He cannot be compelled to sue and he cannot be compelled to renounce his claim, and while he lives, unless he renounces, his wife has no title to sue. The rule no doubt was established at a time when the *jus mariti* had a wider application than it has now, but the rule is now settled, and notwithstanding the provisions of recent legislation in regard to the property of married women there is no indication in the decisions that the rule has been affected or modified. No stronger case could be found than the recent case of *Whitehead* v. *Blaik*, in which it was held that a mother had no title to sue in her own name for damages for the death of her son, even although she sued with the consent and concurrence of her husband who was out of the country. The Lord President (Robertson) said—"No one concerned with this case ever heard of an action of damages by a married woman for the death of her child, or of an action by a father and mother jointly for the death of their child."

In this question the position of the mother is exceptional. Her mental suffering is presumably as acute as that of the father; and if the father dies without exercising the right or discharging the claim, the mother's right to sue emerges. But the law is settled that she cannot sue while the marriage subsists. Does divorce make any difference? I am of opinion that it does not, because, although divorce affects the relations of husband and wife, it does not affect the relations of parent and child; and as the title to sue in such cases depends upon relationship coupled with a reciprocal obligation to aliment, it follows I think that a father's title to sue, even where the divorce was due to his own fault, remains unaffected.

The recent unanimous judgment of this Division in *Foxwell* v. *Robertson*, 2 F. 932, affords a strong illustration. In that case the wife obtained a divorce from her husband in November 1890, made absolute in May 1891. The child of the marriage was left in the custody of the wife. From the date of the divorce until April 1896, when she married again, the entire cost of the child's aliment and education was defrayed by her, and after her second marriage the child was alimented in family with her and her second husband. In May 1899 she raised an action against her first husband concluding for payment of aliment at the rate of £15 yearly for the child from 1st November 1890, the date of the divorce. The defender, the first husband, pleaded that in any case he was only liable in one-half, the divorce having the effect of limiting his obligation as in the case of an illegitimate child; and he succeeded in persuading the Lord Ordinary to decide accordingly. But this Division of the Court unanimously held that the Lord Ordinary was wrong, and gave decree for aliment as concluded for, holding that divorce made no difference upon the father's obligation to defray the whole cost of the child's aliment and education. In that case the law told against the father. But if the child had been killed, would not the father by parity of reasoning have had the sole title to sue?

If, then, divorce does not *per se* affect the position of the father, what remains? The only ground suggested is that the father has neglected his obligation to aliment his children. Now, however hard upon the pursuer such conduct on the part of the husband may have been, it is not, in my opinion, a relevant ground for conferring upon her a title to sue which she would not otherwise possess. Failure to aliment might occur during marriage, and desertion might occur although the husband were living in the same town and his

whereabouts were known. If the husband in this case were to return, he would undoubtedly be liable for the whole of the aliment of his family during his absence; and, in my opinion, he has not by his misconduct and neglect been deprived of the corresponding right to sue in respect of the death of his child.

In those cases in which a wife's title to sue by herself or with a curator *ad litem* has been sustained, the ground of action has always been one peculiarly personal to the wife, such as slander or assault upon her person.

Further, the cases in which one or more parties have been found entitled to sue in the absence of others are cases in which, if all the parties had appeared and concurred, they would have been all entitled to be conjoined as pursuers—*M'Quillan* v. *Smith*, 19 R. 375.

The Court dismissed the appeal, of new sustained the plea of no title to sue stated for both defenders, and dismissed the action.

Counsel for the Pursuer and Appellant—Watt, K.C.—Wilton. Agent—Alexander Bowie, S.S.C.

Counsel for the Defenders and Respondents—Constable. Agents—Mill, Bonar, & Hunter, W.S., and James Forsyth, S.S.C.

Wednesday, February 25.

SECOND DIVISION.

[Lord Low, Ordinary.

PATON *v.* PATON'S TRUSTEES.

Succession—Legitim—Equitable Compensation—Expenses of Litigation on Disputed Claim for Legitim—Parent and Child—Provision to Children.

A bankrupt during his father's lifetime granted a discharge of his right to legitim. His father died leaving a settlement whereby he left his whole estate to be divided among his children in equal shares, but he directed his testamentary trustees to hold the bankrupt's share for his behoof, giving him a right only to the revenue thereof as an alimentary liferent, and destining the fee of that share to the bankrupt's children. On the death of the bankrupt's father the trustee in bankruptcy intimated a claim for legitim. In answer to that claim the testamentary trustees founded on the discharge of the bankrupt's right to legitim, but after litigation they settled with the trustee in bankruptcy by paying about half of the ascertained amount of the bankrupt's legitim, each side paying their own expenses. In an action subsequently brought by the bankrupt against his father's trustees for an accounting, and for payment of his alimentary liferent, *held* (*aff.* judgment of Lord Low) that the testamentary trustees were only entitled to retain the bankrupt's alimentary liferent to the extent necessary to reimburse to the estate the sum paid to the trustee in bankruptcy, and that the expenses which they incurred in the litigation with the trustee did not form a good charge against the pursuer's liferent, but were chargeable against the trust estate generally, the litigation having been conducted not in the interest of the bankrupt alone but of all the beneficiaries.

This was an action of count, reckoning, and payment, at the instance of James Middleton Paton, merchant, Dundee, against the testamentary trustees of his father John George Paton, The Wild, Broughty Ferry.

In October 1889 James Middleton Paton was rendered bankrupt in France, and a trustee was appointed on his estate.

In February 1891 the bankrupt granted in favour of his father a discharge of his right to claim legitim.

On 9th March 1891 John George Paton died survived by seven children, and leaving a trust-disposition and settlement whereby he directed his trustees to divide the residue of his estate equally among his children, but to hold the share falling to his son James Middleton Paton, and pay to him the revenue only as an alimentary provision during his lifetime, the fee being destined to his children.

In April 1891 James Middleton Paton's trustee in bankruptcy intimated a claim for his share of the legitim fund of his father's estate. In reply to this claim the trustees of John George Paton founded on the discharge above referred to, and raised an action in which they sought to have it declared that that discharge was valid and excluded any claim on behalf of the granter's creditors. The trustee in bankruptcy then raised an action of reduction of the discharge and for payment of legitim. These actions were conjoined, and judgment was given in favour of the trustee in bankruptcy in the Outer House by Lord Kyllachy, and his judgment was affirmed by the First Division, decree being pronounced for £6667, 0s., 11d.—*Obers* v. *Paton's Trustees*, March 17, 1897, 24 R. 719, 34 S.L.R. 538.

The testamentary trustees of John George Paton intimated an appeal to the House of Lords, but a settlement was arrived at whereby the trustee in bankruptcy received payment of £3446, and assigned to the testamentary trustees his claim to James Middleton Paton's share of legitim, and each side paid their own expenses. The expenses incurred by the testamentary trustees amounted to £2522, 14s. 8d.

On 12th May 1899 James Middleton Paton raised the present action against his father's testamentary trustees for an accounting, and for payment of the alimentary liferent provided to him by his father's settlement.

The defenders produced accounts, and contended that, as the pursuer had by his trustee claimed and taken his legal rights in his father's estate, he could take no benefit from the provision made in his