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Wednesday, March 20.

SECOND DIVISION.

[Sheriff Court at Perth.

BELL'S TRUSTEE *v.* BELL'S TRUSTEE.

Succession—Legitim—Election—Discharge—Implied Discharge—Legitim Claimed by a Bankrupt's Trustee.

In an action for payment of legitim brought by the trustee on the sequestrated estate of a bankrupt against the testamentary trustee of the bankrupt's father, twelve years after the father's death, *facts* and *circumstances* which the Court *held* to imply that the bankrupt had discharged his claim to legitim and accepted his conventional provisions.

William Finlayson, trustee on the sequestrated estate of John Wanliss Bell, Inveravon Bank, Perth, in September 1905 brought an action in the Sheriff Court at Perth against Henry Jameson, solicitor in Perth, as the sole accepting trustee and executor of the late William Bell, for the sum of £200, or such other sum as should be ascertained to be the legitim or bairn's part of gear falling to John Wanliss Bell as one of the lawful children of William Bell, who had died on 3rd September 1893, with interest from the 3rd of September 1893 till payment.

John Wanliss Bell, the bankrupt, had never claimed legitim, and the only question in the case was whether at the date of the action it was still open to him to make such a claim. It was not disputed that if this question was answered in the affirmative the claim could be now successfully made by his trustee in bankruptcy, although the bankrupt himself had no desire to make it.

The *facts* of the case (which are also briefly summarised in Lord Stormonth Darling's opinion *infra*) are fully set forth in the following findings of the Sheriff-Substitute (SYM), pronounced after proof and subsequently adopted by the Sheriff and the Second Division:—"(1) That the late William Bell died on or about 3rd September 1893, leaving his wife and six children, of whom John W. Bell, the bankrupt, is one, him surviving; (2) that John W. Bell, who is not the eldest child, was then about twenty-three years old, and had already been engaged in training a few young horses, and had had a few small live stock transactions, but that he did not begin business till 1894, as after set forth; (3) that said William Bell's estate was entirely or almost entirely moveable; (4) that it amounted, according to the inventory given up for confirmation, to about £2632, 4s. 11d.; (5) that William Bell left a settlement in the form of a mutual settlement by him and his said wife which bore to dispose of the whole estates of the spouses at the death of the predecessor; (6) that no special mention of the legal rights of children is made therein, and that those had not been excluded by an antenuptial contract of marriage; (7) that these rights are not alleged to have been anticipated by gifts or advances to account of legitim in the case of any child; (8) that under the settlement the widow had the income of the whole estate, she maintaining those children who were in family with her, which is, and has ever since the said William Bell's death been, the case of John W. Bell; (9) that the settlement provided for equal distribution among the children surviving at the widow's death; (10) that, assuming John W. Bell to reside with the widow and to be alimented in her house (as has been the case), the provisions for him in the settlement were on the whole better for him than the taking of legitim, unless he had required an immediate capital sum, but that this superiority of the testamentary provision was not very great; (11) that no careful comparison of the testamentary provision with the right of legitim with a view to a definite election took place at the father's death in the case of John W. Bell, and no definite declaration of election was called for by the trustee of the settlement; (12) that no definite election was absolutely necessary at the time, and that in the case of those children who were still under full age a definite election might have been premature and have been inexpedient to the trustee to have asked; (13) *separatim*, that no written statement of election and discharge of the vested right of legitim was ever granted by John W. Bell; (14) that the questions whether the doctrine of equitable compensation would be applicable to the father's estate in the event of John W. Bell taking legitim, and whether, if so, it would be a good thing for him to take legitim on the footing that his action would not be forfeiture of testamentary provisions, but involve only compensation to the other interests affected, were not raised or considered by him or by the trustee of the settlement, and that he received no legal advice upon the subject from any solicitor in his own interest; (15) that the knowledge of John W. Bell upon the subject of legitim seems to have been simply that he had an interest, according to the number of his father's children, in one-third of his father's moveable estate if he insisted on taking it, but that that would affect (prejudicially, as he understood) the interests of his mother and his sisters; (16) that he was on friendly terms with the trustee of the settlement, who is a solicitor, and had conversations with him about the estate, and that this was the state of matters as it appeared to both; (17) that his wish at the time of his father's death was not to go into that matter at all, but to live on with his mother and sisters, the former having the undisturbed income of the whole estate, according to his father's

intention; (18) that the family seem to have been on affectionate terms, that the children had even before the father's death been admitted to a knowledge of how he and Mrs Bell proposed to regulate their succession, and that from first to last the intention of the children, including John W. Bell, was generally that the mother should have, as the father wished, 'her lifetime' of the moderate means left by the father for the support of his wife and large family, and that if they survived her they should divide the means of the spouses after her death; (19) that John W. Bell began business in dealing in live stock in or about 1894, and that he was, so far, in a position to do without demanding immediate capital funds for his business, partly because it was on a moderate scale and partly because he had a legacy of £500 left by a relative; (20) that this legacy was from the state of the investment not available for immediate use, but that one of the Misses Bell after a time took it over and advanced him money for it; (21) that John W. Bell was, as a child interested in the funds settled by the father, made acquainted with and a consenter to the advance of funds required by the life-renter in consequence of some other money being tied up in an investment which was at least temporarily unprofitable, and that he was in the same capacity made acquainted with and was a consenter to certain necessary advances which his elder brother received, particularly when about six years ago the latter was acquiring business premises for his business as a civil engineer in Perth; (22) that John W. Bell during his residence with his mother as aforesaid made a contribution to the family expenditure in one year when his business profits allowed of it, but otherwise has been alimented and clothed by her out of her income, which consists of the income of the father's estate supplemented by some separate means of hers; (23) that Mrs Bell, while considering in thus affording aliment that she was doing so out of her husband's estate, was also affording it out of her own means, and acting rather as an affectionate parent than as administrator of family funds; (24) that the affairs of John W. Bell having become embarrassed, he, in July 1905, almost twelve years after his father died, applied for sequestration of his estates; (25) that Mr Finlayson, the pursuer, is the trustee in his bankruptcy, and that said pursuer as trustee has made a claim as in right of John W. Bell to take the legitim to which the latter was entitled at the death of William Bell, such claim being the only claim ever made as by or in right of John W. Bell."

The pursuer pleaded, *inter alia*—"(2) The said right to legitim not having been discharged or satisfied, was carried to the pursuer by the sequestration of the said John Wanliss Bell's estates, and he is therefore entitled to the accounting and payment sued for. (4) The bankrupt having made no election between his legal rights as one of the children of the said deceased William Bell and the provisions made in his favour by his father's settlement, the pursuer is entitled to claim the legitim. (5) Assuming that the bankrupt did elect to take the testamentary provisions, the pursuer as his trustee in bankruptcy ought to be restored thereagainst in respect—(*a*) The election was induced by the defender with undue haste and in ignorance on the bankrupt's part of the extent of his legal rights and the considerations material to affect his choice. (*b*) Matters are still entire, and he can be restored against the election without hurt to the testamentary beneficiaries."

The defender pleaded, *inter alia*—"(2) The said John Wanliss Bell having in 1893, at the date of his father's death, accepted of the provisions conceived in his favour under the foresaid trust-disposition and settlement, and in terms thereof having already taken benefit thereunder, all as condescended on, the pursuer's present claim falls to be dismissed. (3) The said John Wanliss Bell's claim to legitim having been discharged or satisfied, the present action is barred, and defender should be assoilzied with expenses."

The Sheriff-Substitute on 10th April 1906 pronounced the following interlocutor:—(*After the findings in fact already quoted*)—"Finds in law that the whole facts, circumstances, and qualifications proven are relevant to infer that said John W. Bell accepted the offer made to him by his father and his father's executor of a provision in lieu of legitim; that such acceptance may competently be inferred without a written discharge, from the facts, taken with the time which had elapsed between the father's death and the bankruptcy, and would have barred John W. Bell from opening up a claim to legitim at the date when his affairs were sequestrated: Therefore repels the pursuer's pleas-in-law: Finds that the action cannot be maintained by the trustee; and assoilzies the defender."

The pursuer appealed to the Sheriff, who on 9th June 1906 affirmed the Sheriff-Substitute's interlocutor.

Note.—"The import of the evidence in this case appears to me to be that John Wanliss Bell knew that he was entitled to a share of his father's estate which the will could not defeat, but that he refrained from demanding it because of a family understanding that the whole should be left in liferent to the mother. I see no reason to doubt this evidence, particularly as it is not overstated. Now I do not think that such a definite family agreement is established that John Wanliss Bell might not have gone back upon it, had he thought better of it, within a few months of his father's death. But it is impossible to ignore the twelve years of acquiescence, and this following upon the understanding is sufficient to exclude the claim. Had John Wanliss Bell been himself the claimant I do not think that upon his evidence of his attitude at his father's death he could now, after the lapse of twelve years, during almost the whole of which he was maintained by his mother, successfully insist in this claim. His creditors are the claimants here, and that justified close scrutiny of the evidence. But if this evidence be accepted

by the Court as true, the case is, I think, on the same footing as if he himself were the claimant. It was urged in Mr Hunter's very able argument, with some citation of authority, that so long as the estate is extant and matters intact, a widow or child may always go back upon a renunciation of legal rights. I do not think that this can be accepted as a sound general proposition, and any dicta which may seem to support it must be read with reference to special circumstances which do not exist here. It was further urged that John Wanliss Bell's knowledge of his rights was imperfect, and that in particular he did not understand the doctrine of equitable compensation. But if a due understanding of the doctrine of equitable compensation be necessary to give validity to a discharge of legitim, no layman, and I fear but few lawyers, are capable of discharging such a claim. I think that John Wanliss Bell knew enough to enable him to protect himself.

"As regards lapse of time, the pursuer relied strongly upon the case of *Crellin* v. *Muirhead*, 20 R. 51. In that case, however, there was not during the long interval a knowledge of the existence of the right, because it appears to have been supposed that the deceased daughter took a fee subject to her mother's liferent under her father's will. On the other hypothesis, which proved to be the true one, that the daughter had not taken a fee, there was not after her death any question of election. The legitim was an unqualified debt like the widow's claim to *jus relictæ* in the case of *M'Kenzie*, 11 Macph. 681, which was also cited.

"The bequest of the whole estate in liferent to the widow and in fee to the children surviving at the widow's decease is a very common form of settlement among persons of moderate means, and such settlements are generally acquiesced in by the family. Now no case was cited, and, so far as I am aware, there is no case where, under such a settlement, a claim to legitim was sustained which was first preferred at a longer interval than two years after the father's death. But it must often have happened that children so circumstanced got into difficulties or quarrelled with the mother or became bankrupt. If the claim were one which might readily be sustained after a long series of years I should have expected to find cases to that effect. Mr Hunter suggested that the reason there are no such cases is that the law is so clear that the claim must always have been acquiesced in. I am unable to accept this suggestion. I think, on the contrary, that the reason why there have been no such cases is that it has been recognised that abstention for a number of years to prefer an indisputable claim to ready money was, in the circumstances, evidence of election to abide by the will.

"After the death of the head of a family who leaves means, there is always a period of winding-up and readjustments of family arrangements which may be measured even by years. But whilst every case must be judged by its own circumstances, it appears to me that it would be very unfortunate if the general rule of law should encourage members of a family, after a long tract of years, to disturb family arrangements in which at the time they had acquiesced, and upon the faith of which others interested had acted and ordered their lives.

"But however that may be, in the present case I hold it to be proved that John Wanliss Bell agreed to abide by his father's settlement and not to claim legitim."

The pursuer appealed to the Court of Session, and argued—Admittedly the bankrupt had never formally and in writing discharged his claim to legitim. Admittedly, however, such a charge might be inferred from facts and circumstances, and the only question therefore in the case was, were there here such facts and circumstances; there were not. For, firstly, *res* were still *integræ*, no occasion for election arising until the death of the widow—this rendered it *a priori* improbable that an election had been made. Secondly, there was no point of time at which it could be said that he had exercised his right to elect, and no special occasion on which it was even probable that he had done so. There had been no formal meeting with the law agent, no presentation of a formal state of the trust affairs. There was, thirdly, no evidence that he knew the precise nature of his legal rights, and if he did not, then no election made by him could be valid. Indeed it was found as a fact in the case that he did not know anything of the doctrine of equitable compensation under which he might in certain circumstances have obtained both his legal and conventional provisions—*Macfarlane's Trustees* v. *Oliver, &c.*, July 20, 1882, 9 R. 1138, 19 S.L.R. 850; *Gray's Trustees* v. *Gray*, 1907, S.C. 54, 44 S.L.R. 39. The Court was very loth to hold that such a claim as that to legitim had been informally discharged, and mere acquiescence in a settlement was wholly insufficient—*Crellin* v. *Muirhead's Judicial Factor*, November 16, 1892, 20 R. 51, 30 S.L.R. 72; *Stewart* v. *Bruce's Trustees*, June 10, 1898, 25 R. 965, 35 S.L.R. 780; *Duff and Others*, 7 S.L.T. 46.

Argued for the defender—The whole facts and circumstances of the case clearly showed that the son had immediately after his father's death elected to take his conventional provisions. That was obviously the understanding on which the family had been living ever since, so it was absurd to say that *res* were still *integræ*. The question of equitable compensation did not come into the case at all. Further, there was here something very like an antecedent election, the son having known and approved of the settlement before his father's death. See *Baxter's Trustees* v. *Baxter's Executor*, June 27, 1884, 11 R. 996, 23 S.L.R. 803.

LORD JUSTICE-CLERK—The question in any particular case whether a child shall be held to have waived his legal rights and to have accepted the conventional provisions which his parent's testament gives is often

a delicate one, and it must be held to be well established that the fact must be conclusively proved. But that does not mean that the proof must be by establishing direct acts. It may certainly be implied from a course of acting. If the evidence clearly leads up to a safe implication that the choice was made with fair and free deliberation, and without there being any ignorance of important matters which ought to be known before a decisive course is taken, and also nothing having been done by others tending to mislead. In this case I am satisfied, in accordance with the views of the Sheriff in the Court below, that there is sufficient ground for holding that the bankrupt whose trustee is suing elected to take the provisions made for him, and is not now entitled to repudiate these and to claim his legitim, and that his trustee, as representing his estate, cannot, as trustee, make good the claim for behoof of his creditors.

It is quite certain that at no time did the bankrupt claim legitim, and that he has never desired to do so either before or after his bankruptcy. I cannot doubt that he was informed and knew that if he so desired he could repudiate the settlement and claim legitim. It seems to be quite clear that it was the family desire that the widow should receive during her life the full benefit of the income of the estate left by her husband. This family arrangement was not at the time put in any binding form, and I agree with the Sheriff in thinking that if in a reasonable time it had been repudiated, it might have been quite possible to hold that a choice was still open. But the question is whether what occurred in the long course of years did not so crystallise this family arrangement as to make it now insoluble. Let it be supposed that there had been no intervening bankruptcy and that John Bell was now the master of his own estate—for it is thus that the case must be looked at—could he, in the face of what is past, now with success maintain that he was entitled still to claim his legitim? If he could not, his trustee cannot do so in his name.

The questions are — (1) Had John the materials before him for consideration of his right and reasonable opportunity to consider? and (2) on that footing did he elect? I am of opinion with the Sheriffs that these questions must be answered in the affirmative. The bankrupt has deponed that he always wished to do what his father wished, and the Sheriff-Substitute who heard his evidence believes him, and there is nothing to be found in the proceedings to tend to throw the slightest doubt upon his truthfulness. He had friendly and unbiassed advice. Whether he had an accurate knowledge of the law as to forfeiture and equitable compensation I do not think it necessary to inquire. I am satisfied that he knew he could claim rights inconsistent with the will if he chose to do so. I can quite understand a man who had the desire that his father's desires should receive effect, declining even to consider matters of detail as to his legal rights. Could it be said in such a case that after a long course of years he himself could turn round and say—"Although I affirmed my desire to do what was consistent with my father's wishes, and acted myself and allowed all others to act on that footing, I will now maintain that I have new light on my rights, and will repudiate his desires, and take what in strict right I might have claimed twelve years ago." I do not think that he could. He had all opportunity of informing himself, and must be held either to have done so or to have deliberately chosen to accept his father's gifts, and waived consideration of any other rights he might have, preferring *ex pietate* either from regard to his father, or to do the kindest thing he could for his widowed mother. And if during the long period which elapsed all the facts were consistent with his having so acted, the inference that he elected may be irresistible as far as he is concerned. But can his trustee in bankruptcy intervene and set up a different claim? I think he cannot. His claim must be for what the bankrupt could have claimed had he been solvent. It cannot be higher. Here, holding as I do that the bankrupt had abandoned his right, I am of opinion that his trustee cannot make the claim effectual.

It was pleaded to us on behalf of the trustee that the occasion had never arisen for the bankrupt to make his election, and that therefore that matter must be open. I cannot assent to that. It was quite a sufficient occasion when the question arose, as it at once did, on the father's death, to consider what was the course to be taken by the family as regarded securing that the widow should have the full benefit of the income from the estate. The Sheriff-Substitute held that that question was before the son, and that he took the course with intention, which was the only course that would secure the full benefit of liferent to the mother.

I am of opinion therefore that the Court should find in fact in terms of the Sheriff-Substitute, and affirm his judgment and that of the Sheriff, and I move your Lordships accordingly.

Lord Stormonth Darling—There can be no doubt that the trustee on a sequestrated estate is entitled to claim legitim due to a bankrupt provided he is not barred by a previous election to abide by the will made in good faith by the bankrupt himself. There is equally little doubt that such an election may be evidenced by conduct, and does not require anything in the nature of a formal acceptance of the conventional provisions or an express discharge of the legal ones. It is also quite true that legitim, being a claim to a certain proportion of the free moveable estate of the parent, vests *ipso jure* on the parent's death, and cannot be effectually discharged, either expressly or by conduct, without sufficient information of the nature and value of the two rights between which election is to be made. This information is usually supplied by the law agent of the deceased parent, but I have never under-

stood that it must include a full exposition of the law of equitable compensation, which was only established as part of the Scots law of election or "approbate and reprobate" in 1882 by the decision of the Whole Court in the case of *Macfarlane's Trustees* v. *Oliver*, 9 R. 1138. I do not say this as at all implying that the equitable doctrine is not now finally established as part of the law of Scotland, but it is obvious that the doctrine only arises when supervening circumstances give occasion for its operation, and that the explanation of it may therefore quite well be postponed till a period long subsequent to the time when election falls to be made. That time is usually soon after the parent's death, for of course the rights of others, whether conventional or legal, may be materially affected by the nature of the election.

In the present case William Bell, the father of the bankrupt, died on 3rd September 1893 survived by his wife and six children, two sons and four daughters, who are all still alive. Two years before his death Mr Bell senior had made, along with his wife, a mutual trust disposition and settlement, by which the free revenue of the whole trust estate was left for the benefit of the survivor, who was taken bound to supply such of the children as might require it, and especially their youngest unmarried daughter, with clothing, maintenance, and education, the amount of such outlay being left entirely to the discretion of the survivor, and the whole trust estate (with certain exceptions) was to be realised at the death of the survivor, and the proceeds, after setting apart therefrom and paying over to their three unmarried daughters the sum of £1000, were to be divided and paid over equally to and among the whole of their then surviving children, including the said three daughters. There was also a special provision as to the stock of the Commercial Bank of Australia forming the property of the wife which it is not necessary to recite. The deed contained no clause declaring these provisions to be in full satisfaction of legitim, or otherwise expressly excluding the claim for legitim. The pursuer founds upon the absence of any such clause as inferring no forfeiture of the conventional provisions in case of any of the children electing to claim legitim. But none the less was it necessary that an election should be made, and made promptly; for it is manifest that the whole scheme of the settlement would have been upset if legitim had been claimed, and it had been thereby rendered impossible for the trustees to pay the free revenue of the whole trust estate to the surviving spouse.

What happened, according to the findings in fact of the Sheriff-Substitute, was that John Wanliss Bell, being at the time of his father's death a young man of twenty-three, was from the first desirous to live on with his mother and sisters in family, and to leave his mother in the undisturbed enjoyment of the whole (not very large) income, according to his father's expressed wish. He was not sequestrated till 3rd July 1905, and it was therefore more than 12 years after the old man's death that this claim for legitim was put forward by his trustee in bankruptcy. It is also found by the Sheriff-Substitute that no definite declaration of election was called for by the trustee of the settlement, and that no exact comparison of the testamentary provisions with the right of legitim was laid by him before John Wanliss Bell. The value of the testamentary provisions was indeed largely problematical, because contingent on survivance. But John Wanliss Bell knew (approximately at least) the nature of the testamentary provisions, because the whole family, who were living on friendly terms, had been admitted to a knowledge of how their father and mother proposed to regulate their succession in 1891 when the mutual will was made, and he knew not only that his own share of legitim would amount to one-eighteenth of his father's free estate, but also that the amount of the estate was £2600 or £2700. Further, it is certain that he has continued to live as an inmate of his mother's house from 1893 to the present time, and that during the whole of that period he has contributed only about £40 towards the household expenses in the shape of board. In these circumstances I am not surprised that the Sheriff-Substitute finds in law that the bankrupt must be held to have accepted the conventional provisions in lieu of legitim, and that this inference from the facts, taken in conjunction with the long time that had elapsed since the father's death, is a bar to the pursuer's claim just as it would have been a bar to any claim by the bankrupt. It is certain that to allow the claim of the trustee in bankruptcy after the lapse of so many years would upset family arrangements made in good faith at a time when it is impossible even to suggest that there was any desire to defraud creditors, and with the result of doing grave injustice to third parties without the possibility of affording any restitution.

The Sheriff affirmed his Substitute's interlocutor, and I agree with your Lordship that we ought to affirm both.

Lord Low concurred.

Lord Ardwall was absent at the hearing.

The Court pronounced this interlocutor—

"Dismiss the appeal and affirm said interlocutor appealed against: Find in fact and in law in terms of the findings in fact and in law in the said interlocutor of 10th April 1906: Of new repel the pursuer's pleas-in-law and assoilzie the defender."

Counsel for the Pursuer (Appellant)—The Dean of Faculty (Campbell, K.C.)—Macmillan. Agents—Carmichael & Miller, W.S.

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