hart, for Tods, Murray, & Jamieson, W.S.

Counsel for the Respondents—Sir Richard Webster, Att.-Gen. — D.-F. Balfour, Q.C. — Tindal — Atkinson. Agents — Murray, Hutchins, & Sterling, for Mackenzie, Innes, & Logan, W.S.

Tuesday, June 16.

(Before the Earl of Selborne, and Lords Watson, Bramwell, and Morris.)

WHYTE *v.* NORTHERN HERITABLE SECURITIES INVESTMENT COMPANY AND OTHERS.

(*Ante*, vol. xxvi. p. 91, and 16 R. 100.)

Bankruptcy—Nobile Officium — Discharge of Trustee and Bankrupt—Appointment of New Trustee.

A bankrupt was discharged without composition, and his trustee was also discharged. Certain creditors presented a petition for a remit to the Lord Ordinary on the Bills to order a meeting of creditors for the election of a new trustee, as certain assets had not been ingathered, and the petitioners' debts had not been paid in full. The bankrupt objected that the trustee had abandoned all claim to these assets.

The First Division repelled the objection and granted the petition, and the House of Lords *affirmed* this decision and dismissed the appeal.

This case is reported *ante*, vol. xxvi. p. 91, and 16 R. 100.

George Whyte appealed.

Counsel for the respondents were not called upon.

At delivering judgment—

EARL OF SELBORNE—This appears to be an extremely clear case, so far as the question of the competency of the Court of Session was concerned, to make an order in a sequestration for the appointment of a new trustee. For the last thirty years there has been such a practice in the case of funds which have not been got in or distributed at the time of the discharge of the trustee in bankruptcy. No doubt a practice which has continued so long may be wrong, but it is needless to say the presumption is the other way. The case rests upon this proposition, that when a trustee has been discharged, all funds not at that time distributed vest by law in the bankrupt for his own benefit, although the creditors have not been paid 20s. in the pound. I confess I had great difficulty in following that argument, having regard to the express provisions of the Act, as well as for the general purpose for which it was passed. The general purpose was to enable a debtor who could not pay his way to get his discharge upon the footing of giving up the whole of his property for the benefit of the creditors. From the beginning to the end of the Act there is nothing to cut down the right given to the creditors, in accordance with the general purposes of the Act, to have all the funds which vested in the trustees divided among them. But it was argued that the trustee in this case having been discharged, a fund which ought to have gone to the creditors reverted to the bankrupt. I cannot accept that proposition. For my part I look upon the reappointment of a trustee as a mere machinery for giving effect to the rights given by the Act, and I would go the length of saying it was necessarily implied in the Act. It would be very difficult to imagine a clearer case than this, and I move that the appeal be dismissed, but without costs, as the appellant sued *in forma pauperis*.

LORD WATSON, LORD BRAMWELL, and LORD MORRIS concurred.

Their Lordships dismissed the appeal.

Counsel for the Appellant—Haldane, Q.C. — Kemp—A. S. D. Thomson. Agents—Savidge & Southern, for Andrew Urquhart, S.S.C.

Counsel for the Respondents — Graham Murray — Le Breton. Agent — Andrew Beveridge, for Alex. Morison, S.S.C.

Monday, July 27.

(Before the Earl of Selborne, and Lords Watson, Macnaghten, and Morris.)

CLARKE *v.* CARFIN COAL COMPANY.

Reparation—Parent and Child—Action for Damages for Death of Illegitimate Child—Title to Sue.

A woman sued a company for damages for the loss, by the fault of the defenders, of her illegitimate son, who was fourteen years of age. The respondents, founding on the illegitimacy of the son, pleaded no title to sue.

Held (*aff.* the decision of the Second Division) that the pursuer had no title to sue.

The appellant in this case, Mrs Susan Clarke, was the pursuer of an action of damages raised in the Sheriff Court of Lanarkshire, in which she claimed from the respondents £500 in respect of her son's death through their fault. The son, fourteen years of age, was illegitimate, and the respondents (who did not otherwise dispute the relevancy of her case) pleaded that she had no title to sue. This plea was sustained by the Sheriff-Substitute, and his judgment was on appeal adhered to by the Second Division of the Court of Session. Their Lordships gave no opinions, as the point had previously been decided by them in the case of *Weir* v. *The Coltness Iron Company, Limited*, March 16, 1889, 16 R. 614.

The pursuer appealed.

The question before their Lordships was simply this—Is a mother entitled (by the

law of Scotland) to reparation for the death of her illegitimate son from those by whose fault it has been occasioned?

At delivering judgment—

LORD WATSON—This action was brought by the appellant before the Sheriff Court of Lanarkshire for recovery of damages from the respondent company upon the allegation that the death of her illegitimate son—a boy between fourteen and fifteen years of age—had been occasioned by their fault, and that she had in consequence suffered great sorrow and anguish, and had also been deprived of the assistance of her son (who at the time of his death was earning 12s. weekly) in supporting herself and her family. The Sheriff-Substitute assoilzied the respondents, upon the ground that by the law of Scotland an action of *solatium* and damages will not lie at the instance of a natural mother for the death of her bastard child, and his interlocutor was on appeal affirmed by the Second Division of the Court of Session. No opinions were delivered at the advising of the case, which their Lordships held to be directly ruled by the previous judgment of the same Division in *Weir* v. *Coltness Iron Company, Limited*, which is practically the judgment submitted to review in this appeal.

In the Courts below, as well as at the bar of the House, the appellant relied upon the existence of a continuing and reciprocal obligation between a natural mother and her illegitimate child to aliment each other when necessary, which was recently affirmed and given effect to by the Second Division in *Samson* v. *Davie*. In that case a bastard forty-five years of age, who had not seen his mother since he was of tender years except on two occasions, when he did not know that she was his parent, was at the instance of an inspector of poor ordained to relieve the parochial board of the burden of her maintenance. Lord Young strongly dissented from the decision, the majority in favour of it being the Lord Justice-Clerk (Lord Moncreiff), the late Lord Craighill, and Lord Rutherfurd Clark. Starting from that decision, the appellant maintained that the law allows an action of *solatium* and damages to the parent of an illegitimate child against the person whose negligence has caused its death, by reason of there having existed between the pursuers and the deceased, in the first place, near relationship in blood, in the second place a mutual obligation of support arising out of that relationship. It was conceded that there is no legal relationship between a bastard and its parent, but it was argued that inasmuch as the law considers the natural tie which connects them to be so intimate as to give rise to a reciprocal duty of maintenance which it will enforce, they are within the principle which gives a right of action to persons legitimately connected in the same degree.

On this point reference was made to *Eisten* v. *The North British Railway Company*, where the Court dismissed an action by two sisters for reparation in respect of the death of a brother upon whom they were dependent for their maintenance, the main ground of the decision being that the law imposed no obligation of support upon their brother. In *Weir* v. *Coltness Iron Company, Limited*, all the learned Judges were of opinion that if the decision in *Samson* v. *Davie*, in which two of their number (Lords Young and Rutherfurd Clark) had taken part, were regarded as conclusive of the case before them, it would be necessary to hear further argument, and probably to consult the other Judges. They did not find it necessary to adopt that course, and proceeded to dispose of the case upon the assumption that *Samson* v. *Davie* was well decided. Shortly stated, their ground of decision was that such an action at the instance of a natural parent was unknown to the law, and that it was for the Legislature, and not for the Court, to determine whether a remedy ought to be given to a person in the position of the pursuer.

I concur in the reasons assigned by the learned Judges for their decision. As matter of fact it cannot be disputed that although for a century past actions for *solatium* and damages have been sustained at the instance of husband, wife, or legitimate child in respect of the death of a spouse, a child, or a parent, a similar action at the instance of a natural parent or child had never (with one exception, which appears to me to be of no moment) been heard of in the law of Scotland. In my opinion the rule which admits the former class of suits does not rest upon any definite principle capable of extension to other cases which may seem to be analogous, but constitutes an arbitrary exception from the general law which was excluded. All such actions are founded on inveterate custom, and have no other *ratio* to support them. I venture to think that the Lord President, in *Eisten* v. *The North British Railway Company*, did not mean to suggest that the rule (or rather the exception) was capable of being extended to cases other than those in which it had already been received. To my mind it is evident that by "nearness of relationship" his Lordship meant legal relationship, because he treats as an essential element of the pursuer's claim the right to demand *solatium*, which is a right to reparation for disruption of the family tie, and therefore impossible in the case of natural parent and child, and also because his Lordship subsequently describes the connection between a bastard and his putative father as "one which the law cannot recognise." The solitary exception to which I have referred is the judgment of a Lord Ordinary (Jerviswoode) in 1867 sustaining the competency of an action of this kind by a bastard's mother. The case has not been traced further, and it does not, in my opinion, constitute a precedent of any value. In his note, as reported, the learned Judge is represented as having said that on the merits of the case he did not entertain any serious doubt. The rest of the note suggests that none of the real

difficulties which beset the question had been brought before his Lordship, who presumably gave judgment on the footing that there was no mutual obligation of support between the pursuer and the deceased. The question of such mutuality was admittedly not decided by the Court of Session until 1887 in *Samson* v. *Davie*, which appears to have led to *Weir* v. *The Coltness Company, Limited*, and the present case.

Although I have, for the reasons already stated, come to the conclusion that the decision of the Court below is right in law, I understand some of your Lordships to be of opinion that these reasons afford a narrow if not an insufficient ground for affirming the interlocutory order appeal. I have in these circumstances thought it right, with the aid of the arguments and of the authorities which were submitted to us, to examine the judgment of the Court of Session in *Samson* v. *Davie*, which has not been brought under appeal. If that decision be not accepted as a correct exposition of the law, the case of the appellant upon her own argument must necessarily fail.

By the law of Scotland there are certain disabilities attached to the condition of bastardy as to which there can be no room for dispute. To borrow language used by the Scottish bench in the year 1692, bastards are regarded as "unlawful productions," which "are not to be encouraged." Unless legitimised by the subsequent marriage of his parents, the bastard has no place in the family of either. In intestacy he has no right of succession to them in heritage or moveables, and he cannot inherit from anyone through them. Should his parents bequeath property to him he must pay the highest rate of succession or legacy duty as the case may be, not because the Legislature has so prescribed, but because he is in the eye of the common law a stranger to them in blood. It humbly appears to me that to impose upon illegitimate children to whom the law denies the status of blood relationship and all rights of succession, a liability to maintain parents, who in the most charitable view have done them a great wrong, would be harsh and inequitable, and I am of opinion that no such rule ought to be enforced unless it is shown to have been firmly established in the law of Scotland. It was no doubt held to be established in *Samson* v. *Davie*, but it is not without significance that Lord Moncreiff, one of the majority, said in giving judgment—"It is true there is a paucity of authority. But there are some cases and *dicta*." An examination of the books has satisfied me that the dearth of authorities tending to support the rule is even greater than the language of the noble and learned Lord would seem to indicate.

Before adverting to the authorities there are two expressions upon which I desire to remark which have been frequently used by Scotch Judges in bastardy cases and by text-writers, one of which appears to me to have been sometimes employed in a way calculated to mislead. It has often been laid down that a bastard is *filius nullius*. Of that expression it is sufficient to say that it is as true in a legal as it is untrue in a natural sense. Again, it has been said that a bastard has a mother but no father. The phrase is unobjectionable so long as it is only meant to express the obvious fact that the maternity of a bastard is, comparatively speaking, a matter of certainty, whereas its paternity may be matter of doubt, and in some cases the father may never be identified. It becomes, in my opinion, mischievous when it is used to convey the suggestion that after the father has been ascertained by admission or by judicial proof, the tie which connects him with the child is more slender and less enduring than that which binds the child to its mother. There is no principle of natural law which can justify such a distinction, and beyond a few loose *dicta* I can find no authority for it in the law of Scotland.

After quoting the constitutional writers his Lordship proceeded—I come to the decisions of the Court of Session, which if not the only are at least the most reliable source from which the true state of the law can be ascertained. The printed decisions range over a period of nearly three hundred years, beginning with the case of *Ker* v. *Tutors of Morislon*, already cited, in 1692, and ending with *Samson* v. *Davie* in 1887. It is unnecessary to refer to them in detail, because the sum and substance of what they do decide can be stated within a narrow compass. First of all, they settle, in conformity with the text of Bankton and Erskine, that there is a joint obligation on both parents to maintain their natural child until it becomes capable of earning its own livelihood, and that the inability of either parent casts the whole liability on the other. The duty of maintenance to that extent is in my opinion one which the parents owe as much to the community of which they are members as to the child whom they have irregularly brought into the world. The bulk of these cases involve nothing more than the conflicting claims of the father and mother to the custody of their pupil bastard, a controversy which throws no light upon the question which your Lordships have to decide. As a necessary consequence of the rule that support must be given by the parents until the child is able to provide for itself, it has been repeatedly held that the parental obligation continues, even after majority, in cases where owing to mental or physical infirmity, the child remains incapable of gaining its own subsistence. In pursuance of that principle the Scotch Poor Law Act has made desertion or neglect to maintain their unemancipated child an offence punishable by fine or imprisonment in the case of a natural mother or putative father, as in the case of married parents. Lord Craighill and Lord Rutherfurd Clark seem to have accepted as authoritative passages in the Digest which undoubtedly bear that a mother and her bastard are

reciprocally bound to support each other. Lord Moncreiff observed that "texts of the civil law are not indeed authorities but illustrations, and very important illustrations." I agree with Lord Young in thinking that the rules of the civil law in the age of Justinian furnish a very unsafe guide to the law of Scotland touching the personal relations of parents and their children, whether legitimate or illegitimate. The two systems of jurisprudence differ widely in regard to family relations between the parent and child, and the principles upon which these ought to rest; and I am not prepared to accept in cases like this any canon of the Roman law which is not clearly shown to have been adopted as part of the law of Scotland.

The appellant relied upon seven decisions by the Sheriff or his Substitute in five different counties between 1851 and 1853, finding an adult self-supporting bastard liable in aliment to the natural mother. These were submitted to the Judges in *Samson* v. *Davie*, but were not noticed by them, obviously because decisions of the inferior courts do not constitute the law. It might be otherwise. Upon the faith of them rights had been created which it would be inexpedient to disturb. But it is idle to suggest that any Scotch bastard has been begotten and born since 1851 in reliance upon his future liability to support his mother. Being of opinion that there is not in the law of Scotland sufficient trustworthy authority to support the Judge in the obligation which was affirmed in *Samson* v. *Davie*, I think the interlocutors appealed from must be affirmed and the appeal dismissed, and I move accordingly.

The EARL OF SELBORNE, LORD MORRIS, and LORD MACNAGHTEN concurred.

Their Lordships dismissed the appeal with costs.

Counsel for the Appellant — Rhind — Baxter—M'Ilwraith. Agent- A. Beveridge, for Wm. Officer, S.S.C.

Counsel for the Respondents — Cook. Agents—Deacon, Gibson, & Medcalf, for Simpson & Marwick, W.S.

Tuesday, July 28.

(Before Lords Herschell, Watson, and Morris.)

WELCH *v.* TENNENT.

Ante, June 28, 1889, 26 S.L.R. 600, and 16 R. 876.)

Husband and Wife — Foreign — Heritable Estate of Wife in England — Sale of Wife's Estate with her Consent — Husband's Right to Proceeds—Jus Mariti—Donatio inter virum et uxorem—Surrogatum—Act for the Abolition of Fines and Recoveries (3 *and* 4 *Will. IV. c.* 74).

The wife of a domiciled Scotsman, with concurrence of her husband, sold a heritable estate belonging to her in England and acknowledged the conveyance before two commissioners appointed under the Act for the Abolition of Fines and Recoveries (3 and 4 Will. IV. c. 74), and "declared that she did intend to give up her interest in the said estate without any provision made for her in lieu thereof." Her husband received the price, and applied it to his own purposes. The spouses subsequently separated by mutual consent, and the wife executed a deed of revocation of all her donations and provisions in favour of her husband. She then sued him for declarator that the amount in his hands was a *surrogatum* for her heritage and not subject to the *jus mariti*.

Held (*rev.* the decision of the First Division) that the price of the wife's interest in the estate did not belong to her as a *surrogatum* for her heritable estate.

This case is reported *ante*, June 28, 1889, 26 S.L.R. 600, and 16 R. 876.

The defender Ralph Dalyell Welch appealed.

At delivering judgment—

LORD HERSCHELL — The parties were married in the year 1877 without any marriage-contract, and the domicile of the husband being Scottish, it was not disputed that this was the matrimonial domicile, and that all questions as to the right to moveables accruing to either of the spouses fall to be determined according to the law of Scotland. The respondent was at the time of her marriage the owner of a freehold estate in England called Overton. She was also possessed of a leasehold house situated there. These freehold and leasehold properties were both sold shortly after the marriage. The £950, as to which the declaration I have mentioned was claimed, was the purchase money of the leasehold house, and as the claim in respect of it was abandoned, it need not be further referred to. The £18,000 was part of the price of the freehold estate which was received by the husband on the execution of the conveyance in July 1877. The balance of the purchase money, £5500, was invested as security for the payment of an annuity of £200 a-year which was charged on the estate. It is not questioned that the £18,000 was received by the husband with the full assent of his wife, but the circumstances under which it was received and the precise nature of the transaction will be hereafter considered. Mrs Tennent on the 28th of December 1882 revoked all donations in favour of her husband, and this action was afterwards commenced.

There can be no doubt, as I have said, that the rights of the spouses as regards moveable property must, in the circumstances of this case, be regulated by the law of Scotland, but it is equally clear that their rights in relation to heritable estate are governed by the law of the place where it was situate. This is not denied by the respondent, but it is said that as soon as