that he agreed with Carson that before Mr Douglas' estate was transferred to the trustees, Carson's debt of £200 should be provided for in one of two ways—either by being paid out of a loan to be effected by Mr Douglas, or by Carson obtaining a security over a portion of Douglas' estate, which in that event would necessarily be not available for the trust. The correspondence proves the existence of the agreement. Leeming was not entitled to do anything in violation of the agreement. In these circumstances, the trust-deed was executed by Douglas on the 22d July 1847, and the marriage took place on the 27th July. Upon the 23d July Leeming sent the deed to Carson, in order to get infeftment passed upon the conveyance in favour of the trustees. Now, if Leeming had made no reference to Carson's debt, and had simply desired him to pass infeftment on the deed, and Carson, without reference to the debt, had undertaken to do so, it would have been difficult to say that there had not been a violation of duty on Carson's part. But that was not the position. In the letter transmitting the deed, Leeming says (*reads letter of 23d July* 1847). It is impossible to contend that Leeming wrote that letter in ignorance of its effect. He is an English practitioner, but his letters show that he knew a good deal of Scotch law. If sasine had been taken on the conveyance to the trustees as it stood, it would have been impossible afterwards for Douglas to give Carson a bond over part of the property so conveyed. Leeming must have meant that infeftment was not to be taken until it should be ascertained whether Carson was to get his debt paid out of a loan to be raised by Douglas, or was to get a bond over the property. The only other alternative is that he meant to cheat Carson. He had positively agreed that Carson's debt was to be provided for in one of two ways; and if he meant to get Carson into the position of having taken infeftment on the whole, he would have been acting dishonestly. I prefer to take the first alternative, that Mr Leeming intended no such wrong. Carson does not acknowledge receipt till 28th July. I am not well satisfied with his letter of that date, followed, as it was, by long silence. It would have been more satisfactory, and more consistent with the frank way in which he had acted up to this point, to have written back—"You have sent this deed to be completed by infeftment, but I cannot follow your instructions until my debt has been provided for." But I cannot but think that the position of Leeming, and his silence for eighteen months, without making any inquiry after the sasine, goes far to show that he understood what Carson was about. He did not expect infeftment to be taken; and that for the simple reason that there was no final arrangement about the debt. This view is confirmed by two letters written by Carson in the interval—22d and 31st December 1847. These letters are quite inconsistent with the idea of sasine having been passed. Even in his letter of 22d Jan. 1849 Leeming expresses no anxiety about the sasine, but asks for the trust-settlement. From this time I cannot help believing that parties were aware that the settlement had not been completed by infeftment. When Carson proceeded in 1849 to obtain from Douglas a bond and disposition in security, not over the whole property, but over a part just sufficient to secure his debt, and afterwards to sell that part, I cannot think that he was committing any fraud. He was asserting his own right. If he had not asserted it in this way it would have been competent to him in another. If Leeming had written, "I insist on infeftment being taken on the settlement," Carson might have secured himself otherwise. No infeftment having been taken up to this time, he might have adjudged the whole property for his debt. But he took payment in a more amicable way, and in a way less expensive to Douglas. By the bond and disposition in security which he obtained, he has operated nothing more than payment of his own debt. In May 1849, when he took the bond and disposition in security, it would have been better, for his own sake, if he had intimated to Leeming what he had done. But I cannot say that there was any fraud or dereliction of duty in not doing so.

While Carson was acting in two characters—partly as agent in carrying through the marriage-settlement, and at the same time as a creditor—he made no concealment that these two characters co-existed, and that he intended to prefer his own claims to the trust. I have come to the conclusion that to award damages to Carson is practical injustice. The trust is not, and never was, entitled to this £200, in whatever form it stands. The person who in law stands vested in it is Carson, and I see no reason in equity for reducing the transaction. The £200 belonged from the beginning to Carson, and never to the trust.

The Court recalled the interlocutor of the Lord Ordinary, and assoilzied Carson as well as the other defenders, with expenses.

Agent for pursuer—John Walls, S.S.C.

Agents for Mr Carson, and for William Fraser, and Fraser's Trustees—Tods, Murray, & Jamfeson, W.S.

Agents for James M'Master and Gordon Fraser—Maitland & Lyon, W.S.

Thursday, June 8.

SECOND DIVISION.

HAMILTON *v.* STEELE.

Suspension—Partnership—Effect of Termination of Contract—Diligence on Bill between Partners. Where partnership at will was terminated as at 10th February 1870, circumstances in which *held* (*diss.* Lord Cowan) that a bill dated 17th March 1870, which was the renewal of a bill between partners to be paid from the proceeds of goods sold, was truly a bill between partners, with reference to a partnership transaction, and not a bill drawn and accepted as between individuals; was not affected by the previous termination of the partnership, and therefore could not form the ground of summary diligence.

By missive dated 3d August 1869, Hamilton and Steele entered into a contract of copartnery for the manufacture of shale oil at Broxburn. Steele was to advance £1350 and Hamilton £300 for the purposes of the concern. The partnership was at will—there being no term of endurance in the missive, and it did not contain any provision as to the name of the firm, but an existing lease of the works where it was intended to carry on the business was to be obtained in Hamilton's name solely. Hamilton was the managing partner, and carried on the business for some time, but Steele constantly complained that Hamilton would not keep

him informed how the business progressed. In the beginning of November 1869 Hamilton said he had run short of money, and asked an advance from his partner. To this Steele agreed, and accordingly, on 15th November, accepted a bill for £300 at 4 months, which he discounted. For this bill he granted a receipt, in which he undertook to retire the bill from funds of oil sold. Thereafter, and towards the end of January 1871, Steele had become so dissatisfied with Hamilton that he determined to bring the contract to an end. The partners accordingly had a meeting on about 1st February at which the partnership was terminated. On the following day they advised with their agent as to how Steele could best be paid out, and the concern taken over by Hamilton. Various proposals were made, but no final agreement made—or at least if made, it was never carried out. Then on 18th March the bill mentioned fell due, but Hamilton being unable to meet it, a new bill was drawn, dated on 17th March 1870, in which the position of parties was reversed, Steele being the drawer and Hamilton the acceptor. This new bill was discounted by Hamilton, and the previous bill retired. On 29th March 1870 Steele advertised in the *Scotsman* and *Herald* newspapers that he would not be responsible for debts incurred by Hamilton from and since 8th February 1870. In all negotiations which took place between the parties subsequent to that date, it was never maintained by Hamilton that the partnership subsisted thereafter, and in particular in certain memoranda prepared by Hamilton relative to a proposed copartnery between him and a Mr Wallace, the bill of 17 March was not included as a liability. Further, in the state of liabilities prepared by Hamilton, as at 1st February, the bill of 15th November was not included as one of them.

When the said bill of 17 March fell due it was not taken up by Hamilton, whereupon Steele did summary diligence upon it, and incarcerated Hamilton. Hence the present suspension and liberation.

In the Bill-Chamber the Lord Ordinary granted liberation and passed the note on juratory caution, to which interlocutor the Second Division adhered. Thereafter a proof was allowed before answer. On the evidence led,

CAMPBELL, with him SHAND, maintained for the complainer that the partnership subsisted subsequent to 1st February, at all events for winding up; that the bill of 17th March was truly a renewal of the one of 15 November, which must be treated as an advance of capital to the concern, and that accordingly the former was a bill as between partners, with reference to partnership matters, and could not therefore be made the ground of summary diligence.

BRAND, with him SCOTT, for the respondent, maintained (1) That the bill of 15th November, though falling to be paid out of the funds of oil sold, was not an advance of capital but a separate loan, and to be dealt with as such. (2) That the partnership was terminated on 1st February. (3) That the bill of 17th March was not truly a renewal of the former bill, but an advance of money by Steele as an individual, and that though the proceeds may have been used to retire the former bill, that was a matter of which Steele had no cognizance, and that this was further shown by the fact that the acceptor shall at the first bill become the drawer of the second. (4) That though a contract of copartnery, terminable at will, might subsist after it was at an end, for the purpose of winding up as betwixt partners, it could not be held to subsist with reference to a transaction which was regarded by the parties at the time as of a separate nature, and not included in the partnership affairs.

The Lord Ordinary (ORMIDALE) pronounced this interlocutor:—

"*Edinburgh, 10th April* 1871.—The Lord Ordinary having heard counsel for the parties, and considered the argument and proceedings, including the proof, finds, as matter of fact, that the complainer and charger entered into partnership, conform to the missive No. 49 of process, dated 3d August 1869, for manufacturing shale oil, at works at Broxburn, upon the terms therein mentioned; that, in order to raise money for the purposes of said partnership, the bill for £300, dated 15th November 1869 (No. 10 of process), was drawn by the complainer upon and accepted by the charger, payable four months after date; that this bill having been discounted by the complainer, who was the active and operative manager of said copartnery, the proceeds were applied by him for the purposes thereof; and that, in order to meet and retire said bill when it became due on 18th March 1870, the bill now charged on was drawn by the charger on and accepted by the complainer, and having been discounted by the latter, the proceeds were applied by him to pay and retire the previous bill: Finds also, as matter of fact, that when the first of said bills was granted it was expected that it would be paid at maturity out of money to be realised from the sale of oil manufactured by the copartnery, but that no such money had been realised when said bill became due, nor has yet been realised: Finds also, as matter of fact, that about the beginning of February 1870, and for some time afterwards, negotiations took place been the complainer and charger having for their object an arrangement whereby the partnership between them should be dissolved, and its debts and liabilities undertaken by the complainer, but that the parties failed to complete any such arrangement: Finds also, as matter of fact, that the affairs of the said copartnery have not yet been wound up, and that the liabilities of the complainer and charger, *inter se*, as the partners thereof, have not yet been cleared up and ascertained: Finds, in these circumstances, that the bill debt now charged on is one of the foresaid copartnery debts, and that in law the charger is not entitled to enforce payment of it from the complainer in the manner now attempted by him: Therefore suspends the decree and charge complained of, and whole grounds and warrants thereof, and decerns: Finds the complainer entitled to expenses, allows him to lodge an account thereof, and remits it when lodged to the auditor to tax and report."

To this view the Second Division adhered, but with a difference of opinion. The majority, consisting of the LORD JUSTICE-CLERK, LORDS BENHOLME, and NEAVES, were of opinion that the Lord Ordinary was right. They considered that the two bills were of the same nature and the first undoubtedly was to be retired by the proceeds of the oil sold. It appeared that in a contingent event, which did not occur, the second bill was to be paid by the complainer personally.

Agent for Complainer—T. F. Weir, S.S.C.
Agent for Respondent—A. K. Morison, S.S.C.

Friday, June 9.

STEWART'S TRUSTEES *v.* EVANS.

Trust—Administration—Bona fides *of Trustees*—*—Personal Liability.* In 1849 a gentleman died leaving a large fortune, which he directed his trustees to divide among certain annuitants and legatees. The deceased had been a partner in a joint stock company, and the trustees in 1850, upon payment of a certain sum, received from the secretary a discharge of all claim against the estate of the deceased in respect of the shares, which were declared forfeited. The company continued in existence until 1861, and paid dividends to the shareholders. The trustees in the meantime administered the estate, and paid it away to the legatees. In 1866 it was decided that the discharge in 1850 was illegal and invalid, and the trustees were placed upon the list of contributaries in respect of the shares held by the deceased truster.—*Held* that, the estate being exhausted by the payment by the trustees of the legacies, in the *bona fide* belief that no claim existed against the estate in respect of said shares, the trustees were not personally liable for calls made upon the said shares.

The late James Stewart of Haughhead, Mauchline, died in 1849, leaving a large property, which he bequeathed to the pursuers as his trustees for the purpose of division among certain legatees. The pursuers accepted of the office of trustees and executors thus conferred on them, and obtained confirmation as executors upon 9th November 1849. In October 1849, shortly after the trustees' acceptance of office, a letter was received by the late Mr Stewart's agents requiring payment of calls alleged to be due upon twenty shares held by Mr Stewart in the Agriculturist Insurance Company. The trustees made an inquiry into the facts, and ascertained that Mr Stewart was a holder of twenty shares, and were informed by the agents and directors of the company that, by a resolution of the company, it was arranged that upon making certain payments the shares might be forfeited and the estate discharged; and having further ascertained that Mr Stewart had, shortly before his death, taken steps for bringing himself under this arrangement, and being satisfied that it would be for the benefit of the estate to carry out Mr Stewart's intentions, they entered into negotiations with the Company for this purpose, which resulted in a final discharge being obtained in the following terms:—

"*London, February* 1850.

"Received by the Secretary of the Agriculturist Cattle Insurance Company, from the trustees and executors of the late James Stewart, Esq., residing at Haughhead, Mauchline, by the hands of James Peddie, Esq., their agent, the sum of £71, 6s. 6d., being the amount due to the said Company in respect of twenty shares of the stock thereof, held by the said James Stewart, conform to statement hereunto annexed; and, as authorised by the directors of the said Company, I do hereby discharge the trustees and executors of the said sum, and acknowledge and declare that the said shares have been forfeited; that the said trustees and executors, as representing the said James Stewart, are not partners of the said Company; that the said Company has no further claim or demand against them as trustees and executors, or against his trust-estate, in respect of his having been a partner; and that no further liability can be incurred by them in respect of the said shares having been held by the said James Stewart."

In conformity with the above discharge, the following resolution of the directors of the Company was inserted in their minute-book on 7th February 1850:—"That the twenty shares standing in the name of James Stewart be forfeited for non-payment of calls overdue, and that the Secretary cause such forfeiture to be registered at the office of the Registrar of Joint Stock Companies." The return to the Registrar of Joint Stock Companies of the forfeiture of the said shares was thereafter duly made.

The pursuers thereafter proceeded to divide the funds in the belief that the matter had been settled.

After the date of the discharge so granted to Mr Stewart's estate in February 1850, the Company ceased to be the same company as that in which Mr Stewart had been a shareholder, its constitution and business being altered; and although the Company carried on business down till April 1861 (when an order for its dissolution and winding up was made by the Court of Chancery), and during all the period from 1850 till 1861, held regular meetings, altered and enlarged its business, incurred new liabilities (its whole debts at the date of dissolution having been incurred subsequent to February 1850), and paid dividends to its shareholders, no notice whatever was given to the pursuers that the discharge of 1850 was to be challenged, or that Mr Stewart's estate had any interest in the Company, or the Company any claim against the estate, until in 1866 the pursuers received a notice from the official manager of the Company, intimating claims against Mr Stewart's estate, in respect of the shares held by him. These claims were subsequently enforced by the official manager against the estate, and the trustees paid them to the amount of £690 sterling out of the trust-funds remaining in their hands. Since the intimation by the official manager in 1866, the trustees had not distributed among, or paid over to, the beneficiaries any portion of the funds then in their hands. The balance of the estate in the hands of the pursuers, as at the date of this summons, amounted to a sum of £383, 14s. 1d. sterling. This sum, with interest, and under the deduction of the expenses of this process, and of further expenses of management, formed the fund *in medio*.

The trustees alleged—"The beneficiaries under Mr Stewart's settlement lay claim to this sum, and have frequently desired and required the pursuers to pay it over to them, but the pursuers are not in safety to do so, in respect the defender, Mr Evans, the official manager of the Agriculturist Cattle Insurance Company, has intimated to the trustees that a further call has been made against the estate, which more than exhausts the amount of the fund remaining in their hands."

It was decided by a final judgment of the Lord Chancellor (CHELMSFORD) that the discharge referred to, granted in 1850, was invalid, and the trustees of the late Mr Stewart were placed by his Lordship upon the list of contributories.

The official liquidator, Mr Evans, claimed the whole trust-funds, and furthermore pleaded that the trustees were personally liable in payment of all the calls, to the amount of £3000, which were due upon the shares, in respect that they had paid away the trust-estate to legatees before payment of the debts due by the estate.

The Lord Ordinary (JERVISWOODE) pronounced this interlocutor:—

"*Edinburgh, 20th December* 1870.—The Lord Ordinary having heard counsel in the conjoined processes, and made avizandum, and considered the same, with the proof, debate thereon, and productions, including the joint note of admissions, No. 73 of process, and having regard to the preceding interlocutor, as pronounced by the Lord Ordinary on the 10th November 1869,—Finds, 1st, that the pursuers and real raisers of the present process of multiplepoinding, who are the accepting and surviving trustees and executors of the late Mr James Stewart, have been called on by the defender, Mr Lewis Henry Evans, as official manager of the Agriculturist Cattle Insurance Company, to make payment to him of the sum of £3000 out of the funds of the said deceased James Stewart, as the amount of a call made by the said official manager; and that the order in Chancery, of which suspension is now sought by the complainers, the said trustees, relates to the said call; 2d, That, prior to the date (11th January 1869) of such order, and on or about the 8th February 1850, the raisers of the present process of multiplepoinding had made payment to the said Agriculturist Insurance Company of the sum of £71, 6s. 6d., and did then obtain an acknowledgment, signed by the secretary thereof, to the effect that the trustees and executors of the deceased were discharged of the said sum, and that the shares in respect of which the payment was made were forfeited, all as set forth in the second statement of facts on the record in the present process of suspension; 3d, That thereafter the complainers (trustees) acted in the management of the trust affairs on the footing that they were no longer interested in or subject to any claim in relation to the concerns and liabilities of the said Company; and finds that, in the course of their management of the trust as aforesaid, they, the trustees, made payment to the beneficiaries, and acted otherwise under the trust, on the faith that no further claim or liability rested on the trust-estate in respect of the shares which had been held to be forfeited as aforesaid: Finds that in the year 1866 the trustees received notice from the official manager of the Company intimating claims against the trust-estate, as stated in the third article of the revised condescendence in the multiplepoinding, and that, in respect of such claims, the trustees made payment of the sum of £690 from the funds of the trust, as is also stated in the said article: 4th, That, since the said notice was received, the trustees have made no further distribution or payment to the beneficiaries under the trust; and 5th, That there now remains in the hands of the raisers and complainers, as trustees foresaid, the sum of £383, 14s. 1d., or thereby, as condescended on in the said process of multiplepoinding: Further, and in relation to the foresaid findings, sustains in the suspension the reasons of suspension, excepting in so far as respects payment to the respondent therein of the foresaid sum of £383, 14s. 1d., and repels the reasons of suspension to the extent of the said sum; and, in the multiplepoinding, ranks and prefers the defender, the official manager, to the said fund of £383, 14s. 1d., with the interest which has accrued thereon since 13th February 1869, the date of the summons of multiplepoinding, and decerns: Supersedes consideration, *in hoc statu*, of the conclusions for exoneration in the action of multiplepoinding; and, as respects the matter of expenses, finds the raisers and complainers entitled to their expenses in both processes, and to retain the same out of the said trust fund in their hands: Allows an account of such expenses to be lodged, and remits the same to the Auditor to tax and to report."

Mr EVANS reclaimed.

Solicitor-General (CLARK) and SHAND for him.

FRASER and ORR PATERSON in answer.

At advising the Court (LORD NEAVES dissenting) adhered.

LORD COWAN—The important question on which parties are at issue in this record is, whether the trustees and executors of the deceased Mr Stewart are liable to make payment of the call on the shares in this company, of which their constituent died possessed, to any greater extent than the amount of the estate actually in their hands? It is admitted that in their administration of the estate they have throughout acted in *bona fide;* but this notwithstanding, it is maintained by the official manager that the plea of exhaustion of the estate in the course of that management is not tenable in law.

These are conjoined actions, the one an action of multiplepoinding and exoneration, instituted by the trustees in February 1869; and the other a process of suspension at their instance of a threatened charge at the instance of the official manager for the sum of £3000, under an order in Chancery, dated in January 1869, the intimation of which order was the cause of these judicial proceedings being resorted to by the trustees. The terms of the order it is material to have in view. It is directed against the trustees as the legal personal representatives of their constituent James Stewart, a deceased member of the company, and as such included in the list of contributories. And it requires payment of the call of £3000 "out of the assets of the said" deceased, "*in their hands*, as such legal personal representatives to be administered in a due course of administration, if they," the said trustees, "have in their hands so much to be administered." The trustees have offered payment of the whole funds in their hands, being £383, 14s. 1d.; and they maintain that no more can be demanded from them, because in a due course of administration, and in *bona fide*, the rest of the funds and estate which belonged to Mr Stewart at the time of his death were paid away in legitimate payments.

The material facts established by the proof are embodied in the interlocutor of the Lord Ordinary, and do not admit of dispute. The death of Mr Stewart occurred in 1849; and his trustees in February or March 1850, after some negotiation, obtained a discharge from the directors of the company, who recorded in their minutes that the shares standing in the name of Mr Stewart were forfeited for non-payment of calls over due. This resolution was duly registered, and an advertisement inserted in the *Edinburgh Gazette* of August 1850 of the fact that the executors were no longer shareholders of the company. In order to effect this settlement and discharge, the sum of £71, 6s. 6d. was paid by the trustees conform. to acknowledgment signed by the secretary. From that date onwards, during the subsistence of the company,—which appears to have continued to carry on business till 1861, and was not brought under the winding up Act till 1865,—the trustees of Mr Stewart were not dealt with as shareholders in any respect whatever. It was not until long

afterwards that any intimation was made to the trustees that liability was held to attach to the trust-estate under their administration. On that footing, in June 1866 a motion was made before the Master of the Rolls, Lord Romilly, to have them put upon the list of contributories. The motion was refused, but on appeal in July of the same year the Lord Chancellor (Chelmsford) reversed the order, and directed Mr Stewart's trustees and executors to be inserted in the list of contributories. Meanwhile, from 1850 to 1866 no notice of any kind concerning the business of the company was made to the trustees, and it now appears that dividends were declared in which they had no participation. On the face of the company's books they did not appear as shareholders any more than if their constituent had never been connected with the company.

These facts are of importance: not to uphold the discharge as having the effect of terminating the liability of the trust-estate—the judgment of the Lord Chancellor in 1866 has ordered the names of the executors of Mr Stewart to be inserted in the list of contributories—but these facts I consider to be all important in demonstrating the entire good faith in which the trustees acted in their administration during the period between 1850 and 1866. They were entitled to believe, and did believe, that there could be no claim on the estate of the nature now held to have attached to it, when the payments were made to the beneficiaries (legatees and annuitants), which are set forth in the documentary evidence. Subsequent to 1866 no payments whatever were made to those parties, and all the funds remaining in their hands after payment of the first call of £690 made in the year 1866 are ready to be paid to the official manager. The question thus comes to be, whether, having in the course of their administration under the settlement of the deceased made payments to the beneficiaries, they are now to be held liable personally to make good out of their own proper funds the difference between this balance of the trust-estate and the £3000, and also all other calls that may be made on the shareholders of this company?

The claim against the trustees is not on the footing of their being personally and individually, or even as a body, partners or shareholders of the company. Had they purchased shares with the trust-funds and taken a transfer to them, the principle recognised by the House of Lords in the case of *Buchanan and Others* v. *The Western Banking Co.*, might have been applicable. Not the trust-estate merely, but the trustees personally, must have been answerable as shareholders. The position of the parties here is essentially different. Their constituent was the holder of these shares, but his trustees were never registered as such. All that they were entitled to do, and all that they did, was to deal with this part of Mr Stewart's estate as administrators. In that character they included the shares in the inventory of the trust-estate as supposed available assets, and in the same character they transacted with the directors of the company in the manner which has been explained. Believing it to be for the advantage of the estate under their charge, they paid the agreed on sum, and considered that they had thus freed the estate from all further connection with the company. No better evidence that the transaction was carried through in good faith on both sides, than the fact that dividends were subsequently declared among the remaining shareholders. No doubt the trust-estate must make payment of this call, so far as there are funds remaining in the hands of the trustees to meet it. Still, it is the trust-estate alone, and not the trustees, that is involved in this responsibility, and it is only in the character of administrators that they come to be involved in this question to any effect.

This view leads directly to the question, whether the payments made in *bona fide* to legatees and annuitants, during the period from 1850 to 1864, were made unduly in the circumstances in which the trustees were placed; or whether, acting as they admittedly did in *bona fide*, it was not in a due course of administration that they made those payments? The order for payment of the £3000 is required to be made by the trustees, as the legal personal representatives of Stewart, out of the assets of his estate in their hands as such, and if they have in their hands so much to be administered. At the date of this order they had no funds in their hands other than the amount already paid and the balance now ready to be paid. Anterior to the date of the order, and in the years 1850, 1851, 1855, 1861, and 1864, sums were paid to the beneficiaries, which, if now in their hands, would have enabled the trustees to meet this call. But having parted with these funds to parties entitled to receive them, under the will of the deceased, on the assumption that all the debts due by the estate had been provided for, I cannot hold that they are to be treated as if they still held these funds in their hands.

Had the estate been exhausted by payments to creditors of the deceased, no claim against the trustees as executors could have been maintained for this debt, the existence of which was unknown, and in truth did not arise until many years afterwards. After the lapse of six months executors are in safety to pay the deceased's debts *primis venientibus*, and creditors delaying to bring forward their claims have themselves to blame. The peculiarity in this case is, that even in competition with the deceased's other creditors this debt could not have been demanded at the time, seeing that it had no existence until the insolvency of the company many years afterwards. No doubt the payments here made were to parties having claims on the estate only after payment of the debts of the deceased. But when the debt now claimed was not only unknown to the trustees, but in truth did not exist, it is difficult to see any legal ground on which payment of the subsidiary claims on the estate could justly be withheld, and assuredly actions by the legatees could not have been successfully defended. I think there are clear principles in the law of Scotland to exempt trustees from liability in such circumstances.

I adopt the principles which your Lordship has fully stated. They appear to me consistent with the authorities of our institutional writers—in particular of Lord Stair and Mr Erskine in the passages referred to. At a very early period of our law indeed it was decided that where count and reckoning had been justly and lawfully made by the executor of his intromissions with the goods and gear of the deceased, "he on na wayes thairefter may be callit as executoir for ony debt auchtand be the deid."—Balfour, *voce* Executor. *Bona fide* payment, as a defence to a demand for monies, which have been paid to the prejudice of the party truly entitled to payment, occupies an important place in the decisions of our Courts. As regards claims for debts, many instances will be found

in Dictionary, under head "*Bona fide* payments," —see particularly case in Robertson's Appeals, p. 317. The remedy of creditors after such accounting, whether for debt existing at the decease of the debtor, but unknown to the executor, and not brought forward *tempestive*, or for debt subsequently emerging, and for which the estate of the deceased may be attached,—must be against those to whom the estate has been lawfully transferred, and whose claims as gratuitous beneficiaries were, from their nature, postponed to the claims of onerous creditors. This is distinctly stated by Bankton (b. 3, t. 8, § 91) "Even payment of legacies, or to the wife or nearest of kin of their shares upon lawful sentence, will be a good defence against creditors who had not interpelled the executor before such payment, unless the debts were consistent with his own knowledge, and the creditors must pursue the receivers for their payment." The expression "on lawful sentence" does not destroy the authority of this doctrine in its application to this case. The payment of debt by the executor, according to the same author, could only with safety be made upon lawful sentence, and so it is laid down by other institutional writers. But this has never been held indispensable, although the want of a decree for the debt may expose the executor to the risk of rendering himself liable for preferential debts, or of objections to the debt, which he might have pleaded judicially, but failed to observe when he paid it voluntarily. And so in reference to legacies when these are clearly due by the estate, and exposed to no objections—payment of them by the executor must entitle him to exoneration as much as if the payment had been made under lawful sentence. The payment must, no doubt, be made in the *bona fide* belief that no preferential claims on the estate existed, and that there were no debts within the executor's knowledge which required to be provided for. Exhaustion of the estate by such payments, as much as by payments to creditors lawfully made, is a good defence to the executor. The only remedy open to creditors subsequently making claim for their debts must be against the parties who have received such payments of legacies, whether special or residuary.

The remarkable circumstances of the present case are such as to require the application of the principle now explained. At the time of the payments to the beneficiaries the trustees had no knowledge of any such debt as this. They knew, indeed, when they entered on office that their constituent had been a shareholder, but they were entitled to believe, and in good faith did believe, that the connection of the estate with this company was at an end. They did not therefore know of this contingent debt or liability on them. On the contrary, they were under the belief that the existence of such debt was impossible. Into that belief they were induced by the act of the directors of the company from the express discharge granted by them and their secretary. A stronger case of *bona fides* cannot be figured. Certainly any creditor of the deceased whose debt was unknown to the executors, and who had abstained from claiming it for so long a period, could not have required payment from the executors beyond the estate actually in their hands. And so with the demand now made against the trustees; and although it must be held that the estate, so far as not exhausted, is liable for these calls to any greater extent, the claim cannot be maintained,—the estate having been duly administered, and there being no funds in their hands to any greater amount than the sum of which payment is tendered.

On the whole, I am of opinion that the Lord Ordinary's interlocutor should be affirmed.

Lord Neaves—I am very sorry that in a case of such importance the Court should not be unanimous; but after much consideration, and after paying great attention to the views stated by your Lordships, I am unable to come to the conclusion that these parties should be exempted from the claim made against them. There are several aspects of the case which require to be separately considered. In the first place, I do not understand it to be seriously maintained that the trustees are to be exempted on the ground that, *de facto*, they have parted with the trust-funds. That of course would be a very easy defence if it were maintainable; but I think the effect of the Chancery judgment is that the trustees shall be answerable for the whole funds which they ought to have in their hands; in other words, for any funds paid away not in the course of due administration. Passing then to the question of *bona fide* payment, we must consider the doctrine on that subject in relation to the circumstances of this case. I do not say that if the trustees had been entirely ignorant of a debt due by the truster they might not have safely parted with the funds to the beneficiaries. But that is not the case before us. The trustees knew that Mr Stewart was at the time of his death a partner of a joint stock company; they knew this at least before they parted with the trust-funds. They must also have known that Mr Stewart's death did not relieve his trust-estate from liability for past and future engagements. I hold that there was a subsisting connection between the trust-estate and the joint stock company, which in a certain sense impignorated the funds of the deceased for implement of the company's obligation. As long as that connection was not legally dissolved, no beneficiary was entitled to the trust-funds. That disposes of a great many of the cases in the books. Now the trustees being aware before they paid away the trust-funds that the connection between the trust-estate and the joint stock company still subsisted, they got a discharge from the directors of the company. The effect of that discharge was that in consideration of a certain sum paid by the trustees, the shares were to be declared forfeited. I do not admire that arrangement, which turns the forfeiture, which is intended as a punishment, into a means of escaping liability. But this Chippenham arrangement has nevertheless been sanctioned by courts of law. Parties, however, entering into it required to see that the directors had authority. Now the time within which the directors could enter into the Chippenham arrangement was limited to a particular day. That was apparent from the circulars sent to the shareholders. The directors had no authority to allow any one to accede to the Chippenham arrangement after the expiry of the time fixed by the resolution of the shareholders. The case then is simply this,—the deceased was due a certain debt, a person offered to compromise it, and the executor accepted the offer, though it was apparent that the person had no authority to discharge the debt on the terms proposed. That is how the case of the trustees stands on the original discharge. I do not know whether Lord Cowan thinks that the discharge

did *instanter* entitle the executors to pay to any one the whole proceeds of the estate; but I am certainly not of that opinion. I think that persons who deal in an unusual manner with the extinction of a debt are bound to see that it is properly discharged; and if a discharge is got from one who professes to be a mandatory of the creditor, but who has in point of fact no mandate, it is utterly worthless, and can afford no defence in a question of this kind. But it is quite possible that subsequent transactions may validate an irregular discharge like this—as was found, I think, in the case of *Brotherhood*. But in this case there is no reason to think that the partners, present and future, of the Company were aware of the irregularity. They could not have known of it. I do not therefore see how a discharge invalid from the first, and not validated by any subsequent proceedings, can become a ground of *bona fides* in a case like this. There was an attempt to get rid of liability by means of a null deed, and I do not see how mere delay, which did not in any way commit the company to it, can protect the trustees from this claim. A joint-stock company is not in quite the same position as other companies. A joint-stock company consists of a fluctuating body of share-holders—often containing minors, lunatics, and others who have not the opportunity of inspecting the company's books. They are entitled to say, we are bound only by the acts of our mandatories within the bounds of their limited mandates. I am not aware of any case in which it has been held that mere silence on the part of the constituent will validate the unauthorised acts of the limited mandatory when there is no reason to believe that he subsequently knew and approved of them.

The grounds on which I am under the necessity of dissenting from your Lordships are briefly these,—that the trust-estate is still a partner of the company, and that it cannot be held that the funds were paid away in the due administration of the estate, seeing that they were paid away after the trustees knew of the existence of the debt, and that they had no reason to suppose that the discharge they obtained proceeded on a due warrant.

Agents for Pursuers—D. & A. Peddie, W.S.
Agents for Defender—Gibson-Craig, Dalziel & Brodies, W.S.

Friday, June 9.

DOBBIE *v.* DUNCANSON.

Sale—Agreement—Discharge—Relief. *Held* a purchaser of heritage who was to get a free title was the party entitled to sue for relief of the cost of the title, and not the agent who made the agreement; and the purchaser was not barred from insisting in this claim by an informal settlement of the transaction.

Process—Summons. Terms of a summons which held to imply a party was sueing in his own right as well as assignee.

In October 1870 the pursuer bought from the defender certain house property in Glasgow at the price of £16,000. Under the missives of sale the defender was to give the pursuer a valid title to the satisfaction of him or his agent, free of all expense. The missives were signed on 28th October, and on the same day the pursuer engaged a Mr Morrison to act as his agent in the matter. Morrison accordingly prepared a title for Dobbie, and on the 2d of December he and the pursuer and the defender met at the office of the latter's agent for a settlement of the transaction. Morrison alleged that the defender had agreed to give him one per cent. on the sale, and presented an account for £247, being £160 of commission, and £87 of fees for drawing the conveyance. To this account Duncanson objected. He had, he said, been asked by Morrison to sell the property to a client of his, and had, with some reluctance, agreed to do so on the footing that the price was a satisfactory one. He further asserted that Morrison had offered £16,000 on behalf of his client provided he got a free title; and as he (the defender) was averse to this, that Morrison said he would get the pursuer to employ him to prepare the conveyance, and that, in any event, the one per cent of commission should cover everything save the defender's fees to his own agents. He was, therefore, only due £160 in all. This arrangement Morrison denied. No settlement took place on 2d December, as the defender refused to accept the price under deduction of Morrison's account. As the pursuer had not enough money to pay the full price, he granted his promissory-note to Morrison for £193; and on the faith of this and about £46 previously paid to him by the pursuer, he was to advance £240 to Dobbie. The pursuer got dissatisfied with his agent for his dilatoriness, and alarmed about the purchase, as he learned Morrison was not a certificated agent, and on 9th December settled the transaction in his absence, and wrote to the defender to pay no attention to Morrison's letters. The pursuer then requested Morrison to give him back his note, as the purpose for which it had been granted had not been fulfilled, Morrison never having given him a penny of value for it. This Morrison refused to do, retaining it as payment of the debt due to him by Duncanson. Dobbie in consequence gave directions for an action against Morrison, and on the dependence of the summons used arrestments. Eventually, however, as "making the best of a bad bargain," he took an assignation to Morrison's claim, and gave him a discharge.

The present action was accordingly based on the allegation that Duncanson was due £160 to Morrison for commission, and £87 conveyancing fees, and that Morrison had assigned his rights to the pursuer. The summons was thus framed in regard to the latter of these sums—"(2) of the sum of £87, 0s. 6d. sterling, being the amount paid by the pursuer to the said Archibald Maclean Morrison for the preparation of the disposition of the said subjects by the defender to the pursuer in implement of said sale, and which expenses the defender had become bound, by missive of sale between him and the pursuer of date 28th October 1870, to pay; the said two sums, amounting together to £247, 0s. 6d., but under deduction of two sums of £5 and £2 paid by the defender to the said Archibald Maclean Morrison, leaving a balance due to the pursuer of £240, 0s. 6d. sterling;—to which balance of £240, 0s. 6d. sterling the pursuer obtained right by assignation *executed* by the said Archibald Maclean Morrison in favour of the pursuer, of date the 28th January 1871, and duly intimated to the defender." The defender pleaded—"The pursuer is not entitled to recover the amount of the *ad valorem* fee charged by Mr Morrison for the preparation of the said disposi-