ments of the trust-funds during that period, and that from the death of the testator.

"(3) That the parties of the first part are not entitled in the circumstances set forth in the case to make the proposed arrangement with Mr Fulton.

"(4) That the trustees have the power under the trust-deed to appoint Mr Fulton to be their factor for the management of their interest in the business of Findlater & Mackie, and to allow him a reasonable allowance for his trouble.

"(5) That this question is answered in the negative; and allow the expenses incurred by all the parties to this case, including the *curator ad litem*, to be paid out of the trust-estate, and remit to the Auditor to tax the same, and to report and decern."

Counsel for the Trustees—Dean of Faculty (Clark), Q.C., and Gloag. Agents—Ronald, Ritchie, & Ellis, W.S.

Counsel for the other Parties—Solicitor-General (Watson) and Blair. Agents—Hunter, Blair, & Cowan, W.S.

R, Clerk.

Friday, January 15.

SECOND DIVISION.

[Lord Shand, Ordinary.

LOGAN (SPROAT'S JUDICIAL FACTOR) *v.* ALEXANDER SPROAT AND MRS M'LELLAN.

Trust—Liability of Trustee—Bill—Fraudulent concealment of Fact—Neglect of Duty.

A died leaving a trust-disposition and settlement by which he named certain trustees, who were, after realizing his estate and paying legacies, to divide the residue into three parts, one of which went to B his brother. Some time prior to his death B, being in difficulties, applied to his brother A for aid, which was rendered in the following way—B granted to a banker C, (his own agent, and also his brother's) a trust-deed for behoof of his creditors conveying all the crop and stock of his farm. Thereafter A purchased the crop and stock from C, giving C his bill for the amount, and this bill having been discounted by C the money was applied in paying off B's debts. A thereafter died without having been put in possession of the crop and stock, and of the trustees named by him the only accepting ones were C, B, and B's son. In making up the inventory C did not enter the amount of the bill as an asset of the trust-estate, but some years afterwards he resigned his office of trustee and also the agency. Then C died, and his executrix claimed payment of the amount of the bill against the trust-estate; B having been removed from his office of trustee, the Court appointed a judicial factor. C's executrix claimed payment of the amount of the bill against the trust-estate and obtained decree in absence, which the judicial factor suspended, after which further action ceased for some time. At length, however, the factor raised this action of declarator against B and C's executrix to have it found that—(1) the bill was granted for behoof of B, and that B was bound to relieve A's trust-estate to the amount thereof; and (2) that in event of the factor not obtaining relief against B, C's executrix was barred from maintaining a claim against the trust-estate, or otherwise was bound to relieve the trust-estate of any loss in connection with the bill. *Held* (*diss.* Lord Gifford) that the facts as disclosed on record did not sustain the allegations of fraudulent concealment of fact and loss caused by neglect brought against C.

This case came up by a reclaiming note by the widow of William Hannay M'Lellan of Marks, Kirkcudbrightshire, against an interlocutor pronounced by the Lord Ordinary (SHAND) in an action at the instance of C. B. Logan, W.S., judicial factor of the late Thomas Sproat, Geelong, Victoria, Australia, against Alexander Sproat of Brighouse, Borgue, Kirkcudbright, and the reclaimer. The pursuer was appointed judicial factor on the trust-estate of Thomas Sproat on 28th January 1873, after his brother (the defender Alexander Sproat) had been removed from the trusteeship. Mr Logan on entering on his office found that Mrs M'Lellan, the other defender, had made, and as executrix of her husband was insisting in, a claim against the estate for payment of a bill for £1582, 12s. 8d., granted on 19th April 1858 by Thomas Sproat in favour of W. H. M'Lellan, in respect of an advance made by him to Thomas Sproat of £1510, 12s. 6d. Mrs M'Lellan had obtained decree in absence for the amount of interest since 1859 on 19th May 1863. On the 7th October 1863 a note of suspension of this decree was passed, but no further judicial proceedings had been taken by either party. Mr Logan in May 1874 brought the present action, to have it found that Mrs M'Lellan was barred by the actings of her husband as trustee on the trust-estate from insisting on her claim against the estate.

The summons concluded for declarator—(1) that a bill for £1582, 12s. 8d., dated Kirkcudbright, 19th April 1858, drawn by W. H. M'Lellan upon and accepted by the deceased Thomas Sproat, was granted for behoof of Alexander Sproat, and that Alexander Sproat was bound to relieve the pursuer and the trust-estate of Thomas Sproat of any claim competent to the defender Mrs M'Lellan, as her husband's executrix, in respect of the bill; and (2) that in the event of the pursuer not obtaining relief from Alexander Sproat, Mrs M'Lellan was barred from maintaining a claim against the trust-estate, or otherwise was bound to relieve the trust-estate of any loss sustained through the bill. Alexander Sproat did not enter appearance to defend.

The pursuer set forth in his condescendence that in the early part of the year 1858 Alexander Sproat, tenant of Brighouse, Borgue, in the stewartry of Kirkcudbright, became embarrassed in his circumstances, and applied for assistance to his brother Thomas Sproat, sometime of Geelong, in the colony of Victoria, who had shortly before returned to this country. After some negotiations, in which the late Mr W. H. M'Lellan took part, Thomas Sproat ultimately agreed, upon certain conditions stipulated for his security and acceded to by Mr W. H. M'Lellan, as representing Alexander Sproat, to afford the latter pecuniary assistance, with the view of meeting the pressure which was then put upon him by his creditors; and,

accordingly, on March 1, 1858, Alexander Sproat executed a trust-deed by which he made over to William Hannay M'Lellan, writer in Kirkcudbright, as trustee for behoof of his creditors, his whole estate, heritable and moveable, of every description, with full powers. In pursuance of the stipulations (Art. 4) referred to, a minute of agreement was, on March 4 and 6, 1858, entered into between M'Lellan, as trustee, and Thomas Sproat, whereby the latter purchased the whole stock and effects on the farm of Brighouse at a price to be fixed by a valuator mutually chosen. The sum thus fixed amounted to £1463, 14s. 6d., and M'Lellan proposed that the advance to him should be in the form of a bill for the amount of the valuation, which, together with other small valuations, came to £1510, 12s. 6d. Thomas Sproat acceded to this proposal, and granted his acceptance in the following terms:—

"*Kirkcudbright*, 19 *April* 1858.

"£1582, 12s. 8d.—

"Twelve months after date pay to me or my order, within the Bank of Scotland's office here, the sum of one thousand five hundred and eighty-two pounds twelve shillings and eightpence, value received in effects at Brighouse.

W. H. M'Lellan.
Thos. Sproat."

"To Thomas Sproat, Esq.,
"Rockville, at Great Malvern."

The difference between the sum in the bill and the amount sued for represents the discount. The bill was discounted by M'Lellan on 22d April 1859, and the sum of £1510, 12s. 6d. was shortly thereafter applied by him in payment of the creditors of Alexander Sproat. Thomas Sproat, by a trust-disposition and settlement, dated 22d January 1859, on the narrative that his means and estates were situated partly in Scotland, but chiefly in Australia, appointed two sets of trustees, the one to act in Scotland and the other in Australia. In Scotland he appointed his brother Alexander, William Hannay M'Lellan, Robert Macartney Gordon of Rattrae, Kirkcudbright, and Gilbert Malcolm Sproat, son of Alexander Sproat, and to these persons disponed and assigned all his property, heritable and moveable.

The purposes of the trust were—(1) the payment of debts and expenses; (2) the investment of a sum of £3000 for behoof of the truster's niece Mary Sproat Kerr, under certain protective conditions, and (3) the division of the residue into three equal shares—one to the children of a deceased brother, one to Mrs Elizabeth Sproat, the truster's sister, and one to his brother Alexander already mentioned. Certain other trustees were appointed for the Australian property, and the purposes of this trust were—(1) payment of debts and certain legacies; (2) remission of the whole balance to the Scotch trustees, whose joint receipt, or that of the majority of them, should be a sufficient discharge for the same. Thomas Sproat died on 30th January 1859. Of the trustees named all except Mr Gordon of Rattrae accepted and acted, but on 29th March 1860 Gilbert Malcolm Sproat resigned, and Thomas Alexander Sproat, residing at Brighouse, a son of Alexander Sproat, and the now deceased Thomas Sproat, farmer at Rainton, were assumed as Scotch trustees along with the accepting trustees. William Hannay M'Lellan resigned his office of trustee on 15th August 1862, and Thomas Alexander Sproat resigned his office on 28th January 1869. Soon after Thomas Sproat's death Mr M'Lellan was appointed agent of the accepting Scotch trustees, and until his resignation the trust-estate in Scotland was practically under his direction and guidance. As agent for Thomas and trustee of Alexander Sproat (Art. 13), Mr M'Lellan was fully informed of the whole circumstances connected with the advance to Alexander Sproat of £1510, 12s. 6d. During the lifetime of Thomas Sproat, however, after the date of the bill, he took no steps, as his duty as Thomas Sproat's agent required him, to make the sale of the effects at Brighouse effectual to Thomas Sproat under the minute of agreement, so as to put him into possession. The pursuer (Art. 11) maintained that it was M'Lellan's duty, as trustee of Thomas Sproat and as agent for the trustees, to take steps to recover the money as an asset of Sproat's estate, and that he failed to do this,—indeed, on the contrary, that, in breach of his duty as trustee and as agent, he wilfully omitted to give up either the sum of £1510, 12s. 6d., or the effects at Brighouse, in the inventory of the estate. An additional inventory of the estate was given up and sworn to by Alexander Sproat on 20th August 1862, but in it also M'Lellan wilfully omitted to include either the £1510, 12s. 6d., or the effects at Brighouse, although a promissory-note by Alexander Sproat to the deceased for £120, dated 30th July 1858, was duly entered and given under the head of effects omitted with reference to the inventory first prepared and sworn to.

The pursuer averred (Art. 15) that this omission was for the purpose of protecting Alexander Sproat from claims for this sum of money at the instance of the beneficiaries under Thomas Sproat's trust-deed, and that M'Lellan's position as one of and agent for the trustees, and the close relationship existing between Alexander Sproat and Gilbert Malcolm Sproat, the two other accepting trustees in Scotland, enabled him to take this step without challenge. In the minute of meeting of Thomas Sproat's trustees, held on 23d April 1859, prepared by M'Lellan, there is no mention made of the claim which Thomas Sproat's estate had upon Alexander Sproat in respect of the bill, or of the effects at Brighouse. On the contrary, the bill is described merely as a debt due by the deceased to M'Lellan.

It was further alleged (Art. 16) that M'Lellan aided and abetted Alexander Sproat in proceeding to Australia and unwarrantably intromitting with the Australian lands of the truster, which formed the bulk of his estate. Several actions at the instance of beneficiaries under Thomas Sproat's deed against Alexander Sproat, who was for many years sole trustee of Thomas Sproat, calling upon him to account for his intromissions with the trust-funds, have been raised in the Court of Session, and are still in dependence.; but, in the most favourable view in which these can terminate for the beneficiaries, it was asserted that great loss would result from the illegal interference on the part of Alexander Sproat with a part of the estate with which he had no concern.

Again, the pursuer averred (Art. 17) that W. H. M'Lellan, not content with neglecting his duties as a trustee and as agent for the trustees, on 12th November 1863, after his resignation as one of Thomas Sproat's trustees, addressed a letter in the following terms to the trustees of the late Mrs Elizabeth Sproat or Thomson, a sister of Thomas Sproat:—"You are aware, I presume, that the late

Mr Thomas Sproat of Australia purchased from the trustees of the late Sir John Gordon of Earlston the lands of Tonguecroft, in the parish of Borgue, at the price of £3000, and, to enable him to pay the price, he borrowed on his promissory-note one-half of the price from me, and the other half from Mrs Thomson on mortgage bond. The loan from me was £1582, 12s. 8d., which included the discount of the promissory-note during its currency, and the bill was due 22d April 1859. This debt is still outstanding, and the estate of Tonguecroft being disponed to Mrs Thomson by her brother Thomas Sproat by a *mortis causa* deed, is still liable in payment of the debt. I have therefore to request that no steps shall be taken by you with reference to the lands of Tonguecroft to the prejudice of my claim." This the pursuer stated to be false, and was known by M'Lellan to be so.

Moreover, the trust-estate of the deceased Mrs Thomson consists of, *inter alia*, a third share of the residue of Thomas Sproat's estate, and the connection between the two trust-estates has been otherwise much complicated by the circumstance that Thomas Alexander Sproat, a son of Alexander Sproat, was for many years, and until recently, sole trustee on Mrs Thomson's estate, and concurred with his father in devising means to avoid or delay an accounting on both estates, and thereby defeat the claims of the beneficiaries. The investigations pursued in the actions above referred to have been of a very intricate and expensive character, and much of the expense had, it was asserted, been caused by the inquiries necessary to be instituted in connection with the erroneous and false statements contained in M'Lellan's letter of 12th November 1863. Further, the pursuer stated that there was every probability that a portion at least of these expenses would become an ultimate charge against the trust-estate of Thomas Sproat; and he reserved action against the representatives of M'Lellan for any loss which the trust-estate might thus sustain.

On 19th May 1863 M'Lellan raised an action in the Court of Session against the then acting trustees of Thomas Sproat for payment of £1582, 12s. 8d., and the interest that had accrued thereon, and having obtained decree in absence, proceeded to use arrestments thereon in the Bank of Scotland's branch at Gatehouse, where £3000 had been deposited by him and his co-trustees to meet a legacy left by Mr Thomas Sproat to his niece Miss Kerr. The decree having been extracted, and Thomas Sproat's trustees threatened to be charged upon it, they consigned in the hands of the Bill Chamber Clerk the expenses of the decree and of extract, and on October 7, 1863 presented a Note of Suspension craving to be reponed against the same, which note the Lord Ordinary on the Bills passed. No procedure took place under the Note of Suspension since the date of the interlocutor, until March 10, 1874, when the pursuer moved that the same should be wakened and transferred against the defender Mrs M'Lellan as executrix of her husband, who died on July 25, 1868. As Mrs M'Lellan maintained that the trust-estate of Thomas Sproat was still liable to her in payment of the bill, it became necessary for the pursuer to revive proceedings in the Note of Suspension with a view to protect the trust-estate under his charge. The present action of declarator was brought as relative to the grounds on which the Note of Suspension is insisted in by the pursuer.

Upon the resignation of M'Lellan as a trustee and as agent for the trustees of Thomas Sproat, Mr Andrew Scott, W.S., Edinburgh, was appointed agent of the trustees. The adjustment of accounts by Mr Scott was continued with Mr M'Lellan or Mr David M'Lellan, writer in Kirkcudbright, his son, and ultimately a state was approved of bringing out as due to Mr M'Lellan, on 5th February 1868, a balance of £226, 17s. 11d. Mr Scott admitted that this balance was correct by a letter, on 13th February 1868, to the person then acting for M'Lellan. The balance had previously been against Mr M'Lellan to the amount of £887, 15s., but it was turned into his favour by allowing him credit for a sum of £1000, with interest, in accordance with an entry in the accounts in the following terms:—"1865, March 28.—To paid Bank of Scotland to account of £1582, 12s. 8d. Bill, £1000." This £1000, it was said, was to a large extent derived from remittances made by the Australian trustees. M'Lellan was not then a trustee of Thomas Sproat; but Alexander Sproat was not entitled to apply the funds of Thomas Sproat's estate for such a purpose, the bill being a debt of his own. On the other hand, M'Lellan, who was fully cognizant of the history of the bill, was not entitled to accept payment of any part thereof from Thomas Sproat's estate, and thereby relieve Alexander Sproat. The adjustment of accounts between Mr M'Lellan's representatives, and Mr Scott on behalf of Thomas Sproat's trustees, was reported to a meeting of Thomas Sproat's trustees on 16th January 1869, in the following terms:—'It was also stated to the meeting that since the said state had been made up Mr Scott had also got an adjustment of the accounts of the late Mr M'Lellan with the trust-estate, and that the balance due to Mr M'Lellan as at 5th February 1868, amounting to £226, 17s. 11d., had, after much trouble with Mr M'Lellan, been approved of by him as correct, but the amount had not been paid, although he had stated that he was willing to accept of Mr Alexander Sproat's bill for the amount, with an understanding that it would be renewed when it became due if it could not be paid from the trust funds. Upon this footing matters still remain. Since the date of the said state of the trust affairs the debt due by Mr Thomas Sproat to the Bank of Scotland, and for which Mr M'Lellan was responsible to the bank, had also been arranged, Mr M'Lellan having paid £1000 to account thereof and interest on the 28th March 1865, thus reducing the debt as at 22d April 1868 to £1450, 7s. 9d., including interest. It was stated to the meeting that the bank had agreed to discharge this debt upon receiving a mortgage for the balance of it by Mr Alexander Sproat and the trustees of his sister Mrs Thomson over the lands in Australia, but from some cause or other this arrangement had never been carried out, and the debt remained still due." This minute was signed by Alexander Sproat and by his son Thomas Alexander Sproat, then the remaining acting trustees under Thomas Sproat's trust-deed; and they both, or at least Alexander Sproat, knew that the true history of the bill was suppresed. This suppression was a breach of duty towards the estate of which they were trustees.

The pursuer further averred that the true history of the bill for £1582, 12s. 8d. had been throughout concealed by M'Lellan and his son David, and that the admission of accuracy was made by

Mr Scott in the belief, fraudulently induced, that the bill represented an advance made by M'Lellan to Thomas Sproat. Mr Scott ultimately learned casually by a statement made in an action raised by Miss Kerr, a niece of Thomas Sproat, against Mrs Thomson's trustees, what the true history of the bill was. And he thereupon, on June 4, 1869, wrote to Mr David M'Lellan:—"I was informed by your father (Mr W. H. M'Lellan) at my meetings with him in 1869, in reference to the diligence which he raised on this bill, that it was incurred by Thomas Sproat in consequence of his purchase of Tonguecroft, which took place about that time." Mr Scott then proceeds to give Alexander Sproat's version of the transaction, and adds—"Neither has your father entered it in the inventory of Thomas' estate, and he has uniformly treated it as a debt by Thomas (which it was), but without claim of relief therefor against Alexander." In reply to this communication, Mr David M'Lellan, on June 7, 1869, admitted the accuracy of the statement. Subsequently to this, Alexander Sproat, in gross violation of his duty as a trustee, appended a docquet to a document bearing to be "state of debt due by Thomas Sproat's trustees to the representatives of the late W. H. M'Lellan, Kirkcudbright," in the following terms:—"*Brighouse, May 4th*, 1870.—I have examined the foregoing account, and find it correct, and certify that at 5th February 1870 there was a balance of one thousand five hundred and eighty-two pounds 1s. 11d. due to the executrix of William M'Lellan." In this "state of debt" M'Lellan was credited with the payment of £1080, and with interest thereon from 23d June 1863 to 5th January 1870, amounting together to the sum of £1316, 0s. 2d.; and the pursuer averred that when Mrs Frances Sophia Rainsford or M'Lellan received, and Alexander Sproat granted, the certificate, they both well knew that the bill in question had been granted for behoof of Alexander Sproat, and that he was liable. Alexander Sproat, since this action was raised, applied for sequestration, and Mr Milne, C.A., was appointed trustee. Mr Logan lodged an ordinary claim in the sequestration founded on the bill in question. As, however, Mrs M'Lellan still maintained that she was a creditor upon the trust-estate in respect of an unpaid balance upon the bill, it became necessary to include her in the conclusions with reference thereto. The pursuer maintained that, in so far as relief to the trust-estate might not now be available against Alexander Sproat, it had been lost through the fraudulent representations of M'Lellan, by reason of which the defender Mrs M'Lellan was now, as executrix, bound to free the pursuer, in so far as he might not succeed in maintaining his right of relief against Alexander Sproat.

Mrs M'Lellan in answer to these averments put upon record by the pursuer denied the accusations made against her husband, and further, maintained that the only remedy was by way of an action of damages against her husband's representatives, and that she should be assoilzied from the present action.

The pursuer pleaded—"(1) The bill in question having been accepted by the deceased Thomas Sproat for and on behalf of the defender the said Alexander Sproat, and the same being still unpaid, the said defender is bound to free and relieve the pursuer, the said Charles Bowman Logan, as judicial factor foresaid, of the sum in said bill, with the legal interest due thereon. (2) If, and in so far as the pursuer the said Charles Bowman Logan, as judicial factor foresaid, shall fail in making his right of relief effectual against the defender the said Alexander Sproat, the other defender, the said Mrs Frances Sophia Rainsford or M'Lellan, as executrix foresaid, is, in respect of the actings and representations of the said W. H. M'Lellan, above condescended on, bound to free and relieve the pursuer, as judicial factor foresaid, of any claim in respect of said bill. (3) The said W. H. M'Lellan not having been entitled to take credit for the payment of said sum of £1000, with interest thereon, the defender, the said Mrs Frances Sophia Rainsford or M'Lellan, as executrix foresaid, is liable in payment to the pursuer, the said Charles Bowman Logan, as judicial factor foresaid, of the said sum of £646, 2s. 11d., being the balance against the said W. H. M'Lellan upon the adjusted accounts, with interest, as concluded for."

The defender Mrs M'Lellan pleaded—"(1) The statements of the pursuers are not relevant or sufficient to support the conclusions of the summons. (2) The present defender should be assoilzied, in respect, first, the statements of the pursuers are unfounded in fact; and second, the defender is not indebted or resting-owing any sum to the pursuers."

The Lord Ordinary pronounced the following interlocutor:—

"*Edinburgh, 6th August* 1874.—Having considered the cause, finds that the bill for £1582, 12s. 8d., dated Kirkcudbright, 19th April 1858, mentioned in the conclusions of the summons, was granted by the late Thomas Sproat in favour of the late William Hannay M'Lellan in respect of an advance made by him to the said Thomas Sproat of £1510, 12s. 6d., the difference between that sum and the amount of the bill, being the charge for discount of the bill and a sum of £4 paid to Alexander Sproat, tenant of Brighouse: Finds that the sum for which the said bill was granted was borrowed by the late Thomas Sproat for the purpose of enabling him to assist his brother, the said Alexander Sproat, who was then in great pecuniary difficulties, and that the money was applied by the said William Hannay M'Lellan, with the authority of the said Thomas Sproat, in payment of debts due by the said Alexander Sproat to his creditors: Finds that it was agreed to between the said Thomas Sproat and his brother Alexander Sproat, as a condition of the said Thomas Sproat obtaining the loan or advance for which the said bill was granted, and of the application of the proceeds of that bill towards payments of the debts due to creditors of the said Alexander Sproat, that the said Alexander Sproat should be liable to his brother for the amount, including the discount on the bill, and should grant a security to his said brother over the crop, stocking, and effects belonging to him at the farm of Brighouse, of which he was tenant, for the amount to be borrowed by him and so applied, including the discount on the bill on which the loan was to be obtained; and that the said William Hannay M'Lellan acted as the law-agent of the said Thomas Sproat in advising him as to the best mode of taking a security from his said brother, and in preparing the deeds and carrying out the proceedings necessary for that purpose: Finds that, in accordance with the advice of the said William Hannay M'Lellan, and in order to operate as a relief and security to the said Thomas Sproat of the

sum borrowed by means of the said bill, and thereafter advanced by him as aforesaid, the said Alexander Sproat on 1st March 1858 granted a trust-deed in favour of the said William Hannay M'Lellan, conveying to him, as trustee for his creditors, his whole estates, heritable and personal, and that thereafter the said William Hannay M'Lellan, by minute of agreement entered into between him and the said Thomas Sproat, dated 4th March 1858, sold to the said Thomas Sproat the whole stock, crop, farming utensils, household furniture and plenishing, and other effects belonging to Alexander Sproat, by valuation; and that the valuation thereof amounted to the said sum of £1510, 12s. 6d., borrowed and applied as before-mentioned: Finds that at the death of the said Thomas Sproat, on 30th January 1859, in respect of the agreement between him and his said brother, and of the deeds and proceedings above-mentioned, he was a creditor of his brother the said Alexander Sproat, entitled to be relieved by him of the amount of the said bill, or otherwise entitled to delivery of the said crop, stocking, and effects, or to payment of the value thereof, and to repayment of the discount on the said bill, and that the said William Hannay M'Lellan was aware of the whole facts above-mentioned, and of the liability of the said Alexander Sproat to his brother: Finds that on the death of the said Thomas Sproat the said William Hannay M'Lellan, and the said Alexander Sproat, and Gilbert Malcolm Sproat, his son, became the sole accepting and acting trustees and executors under the trust-disposition and settlement of the said deceased Thomas Sproat, whereby he conveyed to his trustees and executors right to his whole estate, heritable and moveable, including the right to the proceeds of his estates in Australia, which, for the purposes of realisation, were in the first instance conveyed to certain trustees residing there: Finds that the said William Hannay M'Lellan continued to act as such trustee and executor until 15th August 1862, and that he also acted as agent for the trustees until that time, and for some time thereafter: Finds that it was the duty of the said William Hannay M'Lellan as such trustee and executor, within a short time of the death of the said Thomas Sproat to enforce against the said Alexander Sproat the obligations above mentioned under which he lay to his brother, and so to relieve his brother's estate of the amount of the advance for which the said bill had been granted, or at least to require that in the settlement of the claims of the said Alexander Sproat, as a beneficiary entitled to a third of the residue of the estate of the said Thomas Sproat, his brother, which took place in 1861, the said Alexander Sproat should relieve the estate of the advance for which the said bill was granted, or make payment of the value of the said crop, stocking, and effects, and the discount of the said bill, so as to relieve the estate of the amount of the said bill, and, if necessary, to retain from the share of the trust-estate to which the said Alexander Sproat had right the fund necessary for that purpose: Finds that the said William Hannay M'Lellan failed in this duty, and paid or gave over to the said Alexander Sproat his full share of the trust-estate, without any provision being made for his liability to the estate as above mentioned; and that the estates of the said Alexander Sproat having now been sequestrated, the claim of the trust-estate against him in respect of his said liability is of no value: Finds that this claim, by which the estate would have been relieved of the sum now claimed by the defender Mrs M'Lellan, as the executrix of her late husband, having been lost and become of no value through the failure of duty on the part of the said William Hannay M'Lellan, as trustee and executor foresaid, the said defender, as in his right, and liable in his obligations, is not entitled to enforce payment of the said bill against the trust-estate of the said deceased Thomas Sproat, but is barred from maintaining a claim therefor, and decerns accordingly, reserving to the said defender her claim to any composition which the pursuer may recover from the estate of the said Alexander Sproat in respect of his obligations above set forth, and to the pursuer his answers thereto: Finds the pursuer entitled to expenses, subject to some modification in respect of the minutes of amendment, and of restriction of the summons by the pursuer, and allows an account," &c.

"*Note.*—The pursuer, Mr Logan, was appointed judicial-factor on the trust-estate of the late Thomas Sproat on 28th January 1873, after the Court had removed Alexander Sproat from the office of trustee. On entering on his office he found that a claim was made and insisted in against the trust-estate by the defender Mrs M'Lellan, as executrix of her late husband, for payment of the bill above referred to, for the amount of which, and interest since 1869, decree in absence had been obtained before the Court of Session on 19th May 1863. A note of suspension of this decree had been presented on 7th October 1863, and passed, but no further judicial proceedings had been taken by either party.

"The object of the present action is to have it found that Mrs M'Lellan, the defender, is barred by the actings of her late husband in his character of trustee on the estate of the late Thomas Sproat from insisting on payment from the trust-estate of the debt constituted by the bill. The general ground on which the conclusion of the action to this effect is rested, is, that the debt for which the bill was granted by Thomas Sproat was one of which his brother Alexander Sproat was bound to relieve him—that this was fully known to the late Mr M'Lellan when he accepted the office of a trustee and executor of Thomas Sproat,—that in place of operating relief from the debt, which he was in a position to do, as Alexander Sproat was largely interested as a beneficiary in his brother's estate, Mr M'Lellan neglected his duty as a trustee and was a party to the act of giving over to Alexander Sproat the whole of his share of his brother's estate without making any provision for payment of his debt; and that in consequence of his bankruptcy the right of relief has been entirely lost.

"If the debt now claimed by Mrs M'Lellan had been due to a third party, the trust-estate of the late Thomas Sproat would have been obliged to meet it by payment, and could only have made good a claim of indemnification by an action of damages against Mr M'Lellan or his representatives,—and it was maintained for the defender that even in the existing circumstances an action of damages is the proper remedy, and that the defender should be assoilzied from the present action. I am, however, of opinion that this plea is not well founded. It may be true that in defence of the action on the bill, or in the suspension of the decree in absence obtained in that action, the grounds

of the present action could not be maintained; but I think it was competent to the pursuer by a substantive action at his instance to raise the question whether the defender's right to sue on the bill has been forfeited, and that the declaratory conclusions may be entertained and receive effect, although the considerations which entitle the pursuer to decree may be the same as would support an action of damages in respect of money lost to the trust-estate from the failure of Mr M'Lellan to enforce payment of debts due by Alexander Sproat. There are indeed two such debts included in the additional inventory of the estate of the late Thomas Sproat given up by his executors, one for £300, contained in a personal bond, and another for £120, contained in a promissory-note, both granted by Alexander Sproat to his late brother, and it rather appears to me that the considerations which entitle the pursuer to succeed in the present action may also entitle him to succeed in a claim of damages in respect of Mr M'Lellan's failure to recover these sums. I think there is no good reason for saying that the remedy asked in this action can only be given in the form of an action of damages. If on the defender getting payment from the trust-estate of the bill in question, she would be immediately bound to repay the amount in respect of her husband's failure in duty having caused the entire loss of a good claim of relief formerly available, it follows, I think, that her right to enforce her claim has been lost, and I see no good reason for holding that an action of declarator to that effect is incompetent.

"The first important question in the case is, whether, when Mr Thomas Sproat died, and Mr M'Lellan accepted the office of trustee, Alexander Sproat was his brother's debtor for the sum contained in the bill, or for a sum of that amount? It is clear on the evidence how the bill originated. On its face it appears to have been granted for "value received in effects at Brighouse." It is a remarkable feature in the case, which can, I think, only be accounted for by Mr M'Lellan's mistrust either of his right to make his claim good against the general trust-estate, or of his belief that the amount could not be recovered from Mr Thomas Sproat, that in his letter of 12th November 1863 to the trustees of Mrs Thomson he misrepresented the purpose for which the bill had been granted in an attempt to recover the amount from Mrs Thomson's trustees, who had acquired right to the estate of Tonguecroft, which had been disponed by a separate *mortis causa* deed by Alexander Sproat to his sister Mrs Thomson. It has been made quite clear on the proof that the bill in question had nothing to do with the raising of the fund to pay the price of Tonguecroft, as Mr M'Lellan there represents; and no explanation of his statement to that effect has been given by the defender.

"It is clear that the money raised by the bill was obtained by Thomas Sproat in order to assist his brother Alexander in his great pecuniary embarrassments, and that it was applied for that purpose. The correspondence between the two brothers, beginning with the letter of 5th February 1858, No. 6 of process, and continuing till 2d March 1858, and the letters between Mr Mackenzie, writer, Kirkcudbright, and Mr Thomas Sproat, make this perfectly clear. The documents and evidence, to which I think it unnecessary to refer in detail, appear to me farther to show clearly that, while it was left to Mr M'Lellan, acting for Alexander Sproat, to put the security in the best shape, it was intended that Thomas Sproat should be a creditor for the advance, and have the right which Alexander Sproat's creditors had of selling off the effects at Brighouse for payment of the debt. The shape which the security took was a conveyance of Alexander Sproat's crop, stocking, and effects at Brighouse; and the whole evidence shows that Mr M'Lellan was certainly right in the general view which he stated in his letters of 18th June 1859 to Alexander Sproat, and 22d August 1859 to Mr George M. Sproat, Alexander Sproat's son, that the advance which had been got and applied in payment of Alexander Sproat's creditors was a loan, and that Alexander Sproat at his brother's death was bound either to repay the money or relieve the trust-estate of the amount in the bill, or otherwise to account for the crop, stocking, and effects of which he had granted a conveyance to his brother. Something is said in the evidence of Alexander Sproat of an idea that his brother had intended to make him a gift of the money, or of the property in the conveyance, but the very fact of taking such a deed is sufficient to negative this idea; and there is no circumstance to support it, except merely that he allowed his brother to remain in possession of the farm, which he seems, however, all along to have intended to do. If the idea to make a gift of the whole to his brother did occur to Thomas Sproat, I can find nothing in the evidence to show that he expressed this, or gave effect to it; and Mr M'Lellan appears clearly to have had the same idea, as his letters show. Thomas Sproat's settlement was executed in January 1859, and no such bequest or provision was then made.

"What then was Mr M'Lellan's duty when he entered on the office of trustee and executor? He has himself stated in his letters of 1859 that his duty was clear, and that he must treat the advance as a debt. There was no difficulty in operating payment, or its equivalent—relief of the amount in the bill—because the trustees had a large succession to hand over to Alexander Sproat. Their first duty in transacting with him as a beneficiary was to set his obligations to the estate against his claims under the trust-deed. In place of so doing, Mr M'Lellan, who knew all the circumstances, in the first place, on 16th August 1859 took a discharge from Alexander Sproat of his actings as trustee under the trust-deed for behoof of creditors, which Alexander Sproat had granted as part of the arrangement for obtaining the advance from his brother. In the next place, in August 1861 he was a party to handing over to Alexander Sproat the whole share of the trust-estate to which he had a claim, without any provision being made for the debts due by him to his brother, or for relief of the debt now in question In the third place, he refrained from enforcing payment of the bill which forms the subject of the present action, and which, if enforced against Thomas Sproat's trust-estate, would have directly brought up the claim against Alexander Sproat for the amount; and in August 1862 he resigned his office of trustee. Before this time Alexander Sproat had been put in possession of all he was entitled to as a beneficiary.

"Perhaps, even after Mr M'Lellan's resignation Alexander Sproat might have been compelled to pay his debts to the trust-estate, if Mr M'Lellan

had insisted in enforcing payment of the bill, for the claim against the trustees would have led them to demand instant relief; and another creditor of Alexander Sproat, even at that date, obtained security and ultimate payment of a large debt. This creditor was the Bank of Scotland, for which Mr M'Lellan acted as agent. As agent for the bank he had made large advances on bills to which Alexander Sproat was a party; and for the amount of these, being nearly £1500, on his suggestion diligence was threatened against Alexander Sproat, who thereupon, in 1863, granted a mortgage over the portion of the trust-estate which he had acquired in Australia. If Mr M'Lellan had been equally pressing about the debt claimed under the bill now in question, it may be that its amount, or a great part of it, might have been recovered. But in the knowledge that he had failed in his duty to the trust while he held the office of trustee, he refrained from pressing his present claim by diligence, such as the bank threatened, and the relief from the debt has been ultimately lost. The result, on the whole, is, I think, that Mr M'Lellan became liable to meet the obligations which he refrained to enforce against Alexander Sproat; and thus I think his representatives are precluded from recovering payment of the bill in question from the trust-estate. It is the obvious duty of trustees and executors to enforce obligations by debtors to the trust-estate without undue delay; and if they fail to do so they incur personal responsibility themselves. (*Moffat* v. *Robertson*, January 31, 1834, 12 S. 369; and *Fornam* v. *Burns*, February 2, 1853, 15 D. 362).

"In the view which I have taken of the case I see no reason to doubt Mr M'Lellan's *bona fide* belief, for a time, that Alexander Sproat would be able to meet his obligations to his brother's estate out of the Australian property, but I think that in acting for other parties interested in the trust-estate he was not entitled to trust to this, and that having neglected to perform the duty of retaining in the hands of the trustees as much as was necessary to meet Alexander Sproat's obligations, his representatives must suffer, as a consequence, the oss of their right to enforce payment of the bill in question. There was no good reason for settling his claims as a beneficiary and not at the same time requiring fulfilment of his obligations as a debtor to the estate. In any view, before August 1862, the date of his resignation of his office of trustee, he should certainly have compelled fulfilment of Alexander Sproat's obligations to the trust.

"It was maintained for the defender that a reduction of the docquetted account referred to in the answer to Cond. 20. was necessary to enable the pursuer to succeed in the present action. It appears to me, however, that this plea cannot be maintained, because it was not pleaded in the record, or stated until the close of the proof. Where it is to be maintained that a declaratory action is incompetent, or cannot be insisted in until a document founded on shall be set aside by reduction, I think that, in justice to the pursuer, the defenders must state a substantive plea to that effect. Without such a plea the pursuer has no proper notice that such a defence, which practically excludes his action, is to be maintained, and there is nothing more common than that parties deliberately refrain from stating such a plea for the purpose of avoiding double litigation. But, farther, I think that the adjustment of accounts which is founded on, and which took place entirely with the agent representing Alexander Sproat, and with Alexander Sproat himself, cannot be held sufficient to preclude an action like the present by a judicial factor on the estate. The plea in effect is, that Alexander Sproat, by signing the docquetted account has discharged Mr M'Lellan and his representatives from all consequences of neglect or violation of duty, of which he and Alexander Sproat were equally guilty. I am of opinion that the docquet certifying the correctness of the state of accounts cannot have that effect; that Alexander Sproat had no power to discharge his former co-trustee of claims arising from neglect of duty, so as to bind the beneficiaries in the trust, and that on this ground any reduction of the docquet appended to the account is not necessary."

At advising—

Lord Ormidale—My Lords, the reclaiming note of which we have now to dispose relates to a transaction which took place as far back as 1858, between two brothers of the name of Sproat—Mr Thomas Sproat, who died 16 years ago, and his brother Mr Alexander Sproat. Alexander Sproat had a farm at Brighouse, a small farm apparently, as I infer from the circumstance that the value of his whole crop, stocking, and effects of whatever description appears to have been only about £1500, or a little more. It also is very obvious from what has been disclosed in this case that he was at that time drowned in debt. He had several creditors,—who they were, or what were the amounts of their various claims, does not appear,—but he had creditors, and a number of creditors, at that time, who, I think, were pressing; and it therefore became necessary that something should be done to relieve him in his embarrassed circumstances. Now, his brother Thomas Sproat had been in Australia, and it rather appears that he had made money there, and was in circumstances to relieve his brother He was applied to. We have some partial correspondence produced between the two brothers on the subject of the one relieving the other from his embarrassments, and they did at last agree to a transaction—which took this shape. A trust-disposition was granted by Alexander Sproat in favour of the late Mr M'Lellan, a writer and bank agent in Castle-Douglas, and apparently the agent of both the brothers; and a disposition was granted by Alexander Sproat in his favour on 1st March 1858. A few days afterwards, having got this disposition of the stock, crop, and effects belonging to Alexander Sproat, but not having taken any possession under it, Mr M'Lellan enters into a minute of sale of the whole stock, crop, and effects to Mr Thomas Sproat, the brother who had undertaken to relieve Alexander, and that minute of sale having been executed, shortly thereafter, in the month of April, Mr Thomas Sproat accepts a bill in favour of Mr M'Lellan, who had facilities to enable him to raise the amount, nearly £1600, which was the amount of the bill, and with that money the ordinary creditors of Alexander Sproat were paid and discharged, and Thomas Sproat became the sole creditor of his brother.

Now, no possession was ever taken of the effects which under the minute of sale had been sold by Mr M'Lellan as trustee of Alexander Sproat. No delivery was made of those effects

to Thomas Sproat, and it is quite clear to my mind that Thomas Sproat, although he lived for about a year thereafter—dying on the 29th of January of the following year—had never required any such delivery. He did not ask it, and it was not given to him, and I don't think it was a part of the arrangement, looking at that circumstance, that he was to get delivery. Whatever may have been the purpose for which this minute of sale was executed in his favour, unquestionably he did not during his own life take any steps whatever to enforce it, and at the proof,—I mean the proof for the pursuer himself,—he adduces Alexander Sproat as the only witness of any consequence whom he has, and makes some inquiries of him upon this subject.

Alexander Sproat says, "The stock and crop was conveyed over to my brother Thomas in security, as I understood. . . . . My brother knew I was selling off the crop and stock, and dealing with the farm as I thought fit." Now, that is the evidence of Alexander Sproat. It is quite true he is a defender in this action, and the party who is primarily and properly liable in the amount of the bill, but he is adduced as a witness by the pursuer here, and it is impossible, I think, when he is so adduced, to set aside or counteract his evidence. There is another document which bears upon this matter and is also of some importance as indicating the footing upon which those two brothers acted about that crop and stocking in 1858. I allude to the letter of Alexander Sproat to Thomas Sproat dated 2d March 1858, just at the time of this transaction being gone into. Now, that is one of the letters which apparently passed between the two brothers, and really this transaction was got up not so much, as I think was suggested in the course of the discussion, by Mr M'Lellan, but by the two brothers themselves, and the object of it was that Alexander Sproat should be relieved of his creditors, and of the pressure which they were bringing to bear upon him at that time, and that the arrangement should take this form so as to enable Thomas Sproat, who was to relieve him, to get and insist upon getting what he could from time to time in future from the farm, which in the meantime, however, was to be left just as it had been before, with all the crop and stocking in the hands and in the possession of Alexander Sproat. I cannot resist the conclusion that this was the nature of the transaction at first. It may have changed afterwards.

Thomas Sproat having died in the end of January of the following year 1859, leaves a trust-disposition and settlement, in which he nominates certain trustees, among others his brother Alexander, a Mr Gordon (who did not accept), a son of Alexander Sproat, and Mr M'Lellan. The general effect of the settlement was this, that besides a certain legacy of £3000 to a niece, and some other small legacies, his estate was to be divided into three parts, one-third to go to his brother Alexander, one-third to a sister Mrs Thomson, and one-third to a niece Miss Kerr. His property apparently, from which his substance was to be collected, was in Australia, and he accordingly appointed trustees in Australia to realise the property there, and transmit it to this country. Mr M'Lellan accepted the office of trustee, so did Alexander his brother, and so did his nephew Alexander's son. The trust went on and time went on. Thomas Sproat died, and down to this moment, so far as I can discover, the bill which had been granted by Thomas Sproat to Mr M'Lellan remained unpaid. The nature of the action which is brought, and which I shall now advert to, necessarily assumes that it is unpaid, because it is a declarator to the effect that it ought not to be paid to Mr M'Lellan, and that in consequence of he (Mr M'Lellan) having by his acts and conduct as a trustee and as agent—chiefly as a trustee—of Thomas Sproat, forfeited all right to recover this bill, seeing that he ought to have recovered it long ago from Alexander Sproat, and having failed to do so, he cannot now proceed against Thomas Sproat's representatives or estate for it. That is the general nature of the summons. There are two defenders called in the action,—first, Alexander Sproat (who ceased to be a trustee some few years ago, the pursuer Mr C. B. Logan having been appointed judicial factor in his place), and secondly, Mrs Rainsford or M'Lellan, widow of Mr M'Lellan, to whom the bill in question had been granted. The first conclusion of the summons is to the effect that the bill in question was granted for behoof of the defender Alexander Sproat, &c. (*reads.*) In regard to the first conclusion, the defender Mrs Rainsford or M'Lellan has really no concern, and Mr Alexander Sproat, as I understand it, is not here now. He does not resist, and has not resisted that conclusion, for there can be no doubt that that bill was granted and the transaction gone into and the money raised for behoof of Alexander Sproat, and therefore any claim of relief that might rise in favour of the pursuer or the estate of Thomas Sproat was a clear claim of relief against Alexander his brother, unless we come to the conclusion that the money was raised by Thomas and expended in payment of Alexander's creditors as a present or gift. I don't think there are sufficient grounds before the Court in this action to entitle us to say that. It was to lie over. That had been the original meaning of the parties. It was not to be immediately exigible but to lie over, waiting till the circumstances of Alexander would enable it to be paid and discharged. I think that was obviously the understanding of the parties, not only from the letter I have read, and from the evidence, but it is the only intelligible conclusion I gather from the transaction by the conduct of Thomas Sproat, who lived for a year afterwards, and who did nothing for the purpose of securing payment of the bill. That is a conclusion applicable to Alexander Sproat with which we have no concern.

The next conclusion is the one with which we have really to deal here, under the reclaiming note—(*reads*). That is the only conclusion of this summons, so far as I understand the interlocutor of the Lord Ordinary, with which his Lordship has dealt. We have this second conclusion against Mr M'Lellan's executrix and representative, to the effect that she is bound to afford to the pursuer all the relief he asks under the first conclusion, failing his obtaining that relief primarily from Alexander Sproat. Now, the first question, and as it appears to me really the great question which arises in this process, and which the Court, I think, must deal with before they can sustain the judgment of the Lord Ordinary, is to ascertain what are the grounds of action in the record, and whether there are any grounds set forth in such a distinct and intelligible form as to enable the Court safely to give judgment at all in favour of the pursuer. I think that is the first point, and

we can only get at the solution of that question by examining with some minuteness the statements made by the pursuer in the record. I think there is nothing in the first ten articles of the condescendence material to the matter with which we are at present concerned, except the introductory statements applicable to the arrangement between the two brothers and Mr M'Lellan, in 1858 and 1859, to which I have already referred, but in article 11 of the condescendence we have it brought out pretty distinctly by the pursuer that all along there had been at least three trustees acting, and from 29th March 1860 there appear to have been four of them, for Thomas Sproat, farmer at Rainton, is assumed. He then, with Alexander Sproat, Alexander Sproat's son, and Mr M'Lellan, were the four acting trustees, and were so until Mr M'Lellan resigned on 15th August 1862. I think it is of importance here that we should see the nature of the liabilities under which the trustees acted in this deed. We have not got the deed in any of the prints before the Court, but it is in process, and it is important to observe that there is the following distinct clause "declaring that the majority of my said trustees, whether named or assumed, acting for the time, shall always form a quorum, and I declare that my said trustees shall no ways be liable for any omissions in management, nor for the omissions or neglects of their factors, agents, or commissioners; nor for the responsibility of them or their cautioners, if caution shall be required, or for the responsibility of the debtors, purchasers, and others with whom my trustees may transact, but that they shall only be bound to act honourably, and shall no wise be liable singly *in solidum*, or for one another, but each for himself only, and for his own personal intromissions or wilful default, and no further." That, I think, is of some importance. I do not recollect any case raising the question of liability of trustees being dealt with and disposed of by the Court, without the liabilities of the trustees under the deed of appointment being considered, and it is important also to keep in view that there were here for the period in question four trustees acting, and they were entitled to act by a quorum, so that one individual might be utterly helpless whatever was done, but if the others chose to act unduly or irregularly, that did not incur responsibility as against the individual who did not so act. He is not liable singly *in solidum* with the others, but is only liable for his own wilful neglect or his excess of power. In this state of matters, we come at once to ascertain from the record what are the grounds upon which Mr M'Lellan's representative, his widow and executrix, is to be made liable to so considerable an extent for Mr M'Lellan's actings as trustee under this deed of Thomas Sproat. Mr M'Lellan having resigned on 15th August 1862, and having died seven years ago, and this action being brought before the Court seventeen years after the transaction occurred which gave rise to the whole matter, several parties who could have thrown a good deal of light on the matter are gone, and we have not the benefit of what they could have said. I am not disposed to be very critical in regard to a record under our present system, because under the Act of 1868 any mistake in any particular portion of a record can be corrected and put right at almost any time before final judgment, and therefore I would not be inclined to be critical on the subject, if we had really a substantial record before the Court, on which it might be enabled to pronounce a safe judgment. It has been suggested, I am quite well aware, that pleas in law might be dispensed with altogether with advantage, and a good deal might be said on that point, but I never heard it suggested, and I do not suppose it could be suggested, that we should dispense with the record, and I should fancy much less could it be suggested that we should have a record that is not intelligible, that is not set out in such a reasonable way as logically to lead to certain legal results upon which the Court can safely pronounce judgment. Keeping in view these general observations, let us see whether we have such a record here. The next article I notice is condescendence 12—[*reads*]. Now, on 15th August 1862 Mr M'Lellan not only resigned—and therefore as trustee could not by any possibility be liable for anything that occurred subsequently—but after that date we have it in a very distinct statement before us that he ceased to be agent as well as trustee, and another agent was appointed, and acted in his place. We have it set forth in an admission by the parties that at the date I have mentioned Mr M'Lellan resigned his agency under the trust, and that from that date the agency was conducted by the late Mr Andrew Scott. That also is of importance with respect to some of the views which may be taken of the record. In the 13th article of the condescendence, and the ten following articles, we have the grounds on which the liability rests, as stated by the pursuer himself. There are various remarks that might be made on that article which obviously occur, and one which suggests itself to my mind is, that it discloses no ground of liability whatever under this action as against the representative of Mr M'Lellan. It relates to a period during Thomas Sproat's lifetime. Thomas Sproat, I apprehend, during his lifetime had the entire control of his own agent, whoever he might be, who was not entitled to act at all in this or any other matter without the express instructions of his constituent. Well, in this article I do not see it stated that he received any instructions whatever to proceed against Alexander Sproat, or to take any steps in the matter; and I don't think it is possible to assume, were we entitled to assume anything upon the subject, that it could have been the understanding of the two brothers, or of Thomas Sproat, that Alexander Sproat was to be proceeded against. The understanding was quite of an opposite kind—Alexander Sproat was to have delay, and he was left in possession of the stock just as he had been before the minute of sale was entered into, and he continued to deal with that stock and crop as he had done before, and all this in the knowledge of Thomas Sproat. Therefore, it is perfectly clear that, so far as that article goes there is no ground of liability whatever disclosed, and it is not stated in any correct form. The next article (article 14) goes on to say—[*reads*]. I do not understand this action as laid so as to comprehend the mere actings of Mr M'Lellan as agent. His responsibilities as agent are totally different from his responsibility as trustee, but the two things are mixed up in a somewhat singular manner. It is said to have been his duty on the death of Thomas Sproat to take steps for the recovery of the amount of the bill as an asset of Thomas Sproat's trust-estate. No explanation is given as to how it was his duty, and it is assumed also that this debt was an asset of the trust-estate of Thomas Sproat. I do not see that

at all. I can understand this very well—that Thomas Sproat not only was a debtor, but had spontaneously become the debtor in that bill to Mr M'Lellan for the behoof of his brother, and to relieve Alexander from pressing creditors. Well, then, it never could become an asset of Thomas Sproat's estate till Thomas had paid the bill. I could understand that if he had once paid the bill to Mr M'Lellan it might become a very good claim, demandable and exigible by the trustees of Thomas Sproat or the parties in charge of his estate, to operate relief against Alexander. I can understand that; but so long as he did not pay one penny of that debt, how was it an asset? In what way he could have proceeded, or what he could have done against Alexander, I do not exactly see. It does not appear, further, that Mr M'Lellan received instructions to take any steps. If he was agent—and the two things are mixed up,—to make the statement relevant it must have appeared that he had got instructions, and got instructions from parties who were entitled to give them. Then, again, as trustee he was only one of three or four. He was not entitled to act by himself, except with the authority and in the name of the other trustees. Does it appear that they resolved to take any steps on the subject? Then, if they did not, notwithstanding the fact that Thomas had not paid a penny of this bill, was Mr M'Lellan, as one of the trustees, in the very peculiar circumstances in which this transaction originated, liable, under the indemnity clause which I read in the trust-deed, for omitting or neglecting to make the demand? I apprehend that a good deal more would require to be stated to satisfy us that he was liable for the consequences of not doing so. But I do not see it stated that he was bound to do so. It is stated in a manner that there was such a duty upon him, but how there was such a duty upon him, or what steps he was bound to take in the circumstances, there is no explanation given. The pursuer goes on to say that he omitted to give up the sum of the bill in the inventory of Thomas Sproat's estate. Now, as to the mere fact of his not giving it up in the inventory, how that resulted in any loss to the trust-estate I am at a loss to understand. It may have been a form which should have been attended to. I do not know that, in the circumstances, it was, because it rather occurs to me that until Thomas had paid that debt, or his trust-estate had paid it, it could not enter into the accounts of the trustees at all as a claim by them. I do not think that that raises a claim of liability against a trustee. Again, I think in this matter the clause of indemnity will protect the trustee, there not being any averment that there was any wilful neglect on the subject. It is an omission in the circumstances, if there was any proper omission about it at all. The article proceeds to state that in an additional inventory the amount of the bill was also omitted to be included, but that was after the date that Mr M'Lellan ceased to be agent or trustee, and he is no longer liable for the omission. Then in the 15th article, it is said—(*reads.*) By that time the effects of Brighouse, according to the evidence of Alexander Sproat—and it appears to be conclusively proved—which had been sold under the minute to Thomas Sproat, had disappeared. Alexander Sproat had been allowed to remain in possession of the stock, crop, and effects, and had been dealing all along with them as he had previously been, and it is not said that a single animal or a single bushel of grain, or any other portion of stock or crop had remained at that time; and if no such thing remained, how could Mr M'Lellan or any other party be made responsible because he had not proceeded to insist upon recovery of those things which did not exist, and which may have ceased to exist before the death of Thomas Sproat himself. Again, I do not know why the claim in respect of the bill should have been mentioned at all in the minute referred to in that article. Till that bill was paid I do not see any cause to mention anything about it except as a debt due by Thomas Sproat, and having paid his debt he might claim relief. Further, in the 16th article the pursuer goes on to say—(*reads.*) I think there are two things in that article mixed up in a way which had no necessary connection. That is the difficulty in this case, if there is a real difficulty in it. The first part of it relates to Mr M'Lellan having aided and abetted Alexander Sproat in proceeding to Australia. With reference to those other actions—I do not know how they result—I am utterly at a loss to understand how these aid the pursuer in making out a claim of responsibility under this record, and therefore I may dismiss that part of the article at once. But the leading point of the article presents to my mind some difficulty, because it is said in a very general way that Mr M'Lellan aided and abetted Alexander Sproat to proceed to Australia and there to intromit with Thomas Sproat's succession, consisting of lands which had belonged to him. What that results in the article does not go on to explain, but he had some unwarrantable intromission with the estate in Australia. Now that, if it had stood entirely by itself, and without a particle of evidence to illustrate and explain it, would, I think, be wholly unintelligible, and would go for nothing; but then we were referred in the course of the discussion to a receipt which had been granted apparently by the trustees in this country, including Mr M'Lellan, and which certainly does appear to me to be rather a remarkable document, and to my mind creates the only real and serious difficulty which I feel in arriving at the result which I shall ultimately announce. We have no statement in this record explanatory of that at all. We had explanations from the bar—and probably they were correct, but I am afraid when we are asked to give judgment against the trustees we must have something more than mere statement from the bar. We ought to have had on this record some intelligible explanation, so that we might know on what we are asked to proceed. Now in this article 16 I do not find that. I find nothing but this, that Mr M'Lellan aided and abetted Alexander Sproat in proceeding to Australia, and that there was some unwarrantable intromitting with the Australian estates that belonged to Thomas Sproat's trust, but to what effect or what is the result of that intromission is not properly stated. I presume it is intended to connect that statement with that receipt, but I think that, when so formidable a charge as that is made, to render Mr M'Lellan liable for some £8000, would require a very precise, relevant, and intelligible statement on record, which I cannot find. And it is all the more difficult to sustain that general averment in condescendence 16, even in connection with the receipt, without any further explanation, what the pursuer himself says at the

proof. Now, observe what his evidence gives us. If that receipt was signed, and so far as I can see improperly signed, by the trustees in this country, acknowledging receipt of £8000 odds, when they had never received a penny of it, what did it result in? These lands in Australia which had been nominally purchased by Alexander Sproat, and to which he had not got a title, were ultimately sold. There was a diminution no doubt in the price, and the same amount was not obtained for them, but all that ought to have been explained. I am only groping in the dark about it. I do not know how it stands exactly. It is possible I may be under some error and misapprehension, but why? Because we have no intelligible account in the record, and on this question of liability of the trustee it would be most dangerous and improper for the Court to proceed and hold him liable without those necessary explanations. There is only another article of much importance in this record as touching the ground of liability against Mr M'Lellan, and it is the 17th article—(*reads.*) What bearing has that letter upon the present case? I have been at a loss to understand it, and I put the question directly to counsel as to what they made of that in this case. It was more than a year after Mr M'Lellan had ceased to be trustee. It has nothing to do with the matter. Mrs Thomson might, for aught I know, have some cause of complaint by reason of this erroneous statement having been made to her, but no explanation is given, and it is not said on the record anywhere how it bears on the present question. The only inference I can deduce from it is this, that Mr M'Lellan or some party acting for him, in consequence of the lapse of time had forgotten circumstances in some degree, and written the letter under a misapprehension altogether. What answer was made to it does not appear, and we hear nothing more about it. This is the first and last of it, and again I ask, What bearing has it upon the present question of responsibility?

Then we have a statement that Mr M'Lellan, after he ceased to be a trustee, raised an action in the Court of Session to constitute his bill a debt. How that bears on the present question of responsibility, I am at some loss to understand. Either of the parties could have moved in that process. It was just as competent for the present pursuer or the parties who appeared and got decree to have moved in that process as for Mr M'Lellan. But neither the one party nor the other appear to have moved in it, and I can quite understand from the statements which follow why Mr M'Lellan did not think it necessary to move in it. Observe, it was probably very doubtful whether Mr M'Lellan by moving could recover, or from what he could recover, and we see from what follows in the record that the parties got into negotiation for a settlement otherwise. The late Mr Andrew Scott for some time before was in charge of the estate, acting as agent for the remaining trustees, and we find from what follows that negotiations took place between Mr Scott and Mr M'Lellan to endeavour to adjust those claims which Mr M'Lellan had. Mr M'Lellan, however, died in 1868—but what is important is this, that after a negotiation had apparently been going on for years between Mr M'Lellan first, and Mr Turnbull, as acting for him, and Mr Scott, as acting for the trust-estate, a balance was adjusted and brought out in favour of Mr M'Lellan. We have it set forth that this most formal adjustment after years of negotiations come to by the parties advised by individuals of responsibility, is to be set aside upon a mere allegation, without any proof whatever. What evidence is there in this case that the whole of this matter proceeded in consequence of fraudulent concealment and fraudulent misrepresentation on the part of Mr M'Lellan to Alexander Sproat? There is no ground for supposing that to be the case in the circumstances we have here stated. Is it to be imagined for a moment that Mr Andrew Scott was in total ignorance of the whole matter, he having succeeded Mr M'Lellan in the agency in August 1862? Is it to be supposed that he knew nothing of the matter, or had made no inquiry on the subject, or that Mr M'Lellan would have attempted to deceive him by fraudulent concealment and fraudulent misrepresentation? I do not see any evidence in this print—and most undoubtedly in the proof there is no evidence at all. I may make this observation, though I would not be disposed to stand upon it, that if there was nothing else in the case it certainly is not consistent with the usual practice of this Court to set aside a formal agreement such as that without a proper, competent, and relevant action of reduction, but we are asked here to give effect to such a statement as we have on the record without a particle of evidence, and without any reduction. I do not think that can be done at all. I have now concluded all the examination of the record which I think necessary.

Now, I regret in this case, as I regret very much in any case where the parties have incurred considerable expense, where the record has been made up and closed, where documents have been printed at considerable expense, and a great deal of discussion has taken place, that the whole of that should go for nothing. On the contrary, if I could see my way at all upon reasonable and safe grounds to sustain this action, and either now or by some further steps of procedure ultimately to give decree in favour of the pursuer, I would be disposed to do so. But I confess that I am not enabled to do so, and therefore the only conclusion I can arrive at is that the first plea in law for the defender ought to be sustained, and the action dismissed. That may leave it quite open still for the pursuer if he chooses to come and state a better case for liability against the representative of Mr M'Lellan, but in the meantime I am unable, on the grounds which I have stated, to arrive at any other conclusion than that which I have now announced. I have only further to allude to the grounds upon which the Lord Ordinary has proceeded. I cannot find in the record any averment, or in the papers any evidence, in support of the finding in the interlocutor. The only thing that approaches to anything like it—but it is not stated in any intelligible shape at all—is the granting of the receipt for £8000; but it is not stated that that is Alexander's third share, or for what purpose it was granted. "So as to relieve the estate."—Now, how could that have been done in the circumstances to which I have adverted. The stock and crop, it may fairly and reasonably be inferred, had been disposed of already. All that had been sold to Thomas; at all events it had been dealt with and disposed of with the knowledge and approval of Thomas, according to the pursuer's own witness, and did not remain any longer in existence for the purpose of a claim of relief in

favour of Thomas Sproat. Therefore, I think the Lord Ordinary here has fallen into error in the judgment which he has pronounced, and that his interlocutor should be recalled, and the first plea in law sustained.

MR BROWN pointed out that in the evidence of Mr Logan it clearly appeared there had been a conveyance of the Australian lands.

LORD NEAVES—Is that in the record?

MR BROWN—It is not.

LORD NEAVES—I am compelled—I do not say without reluctance—to acquiesce in the judgment now pronounced by Lord Ormidale, and very much on the grounds which he has stated. Whether there is in this case, in all its circumstances, if properly developed, a claim of liability or not I will not say; but upon this record I not only find no clear and consistent statement of relevant grounds of liability, but any that I do find appear to me to be fatal to the action. The immediate question is with regard to a bill for £1582, accepted by the late Thomas Sproat, discounted by the bank, and which has been sought to be recovered by the late Mr M'Lellan, the agent of the bank. Now, what is the history of the transaction as given in the record? It appears that Alexander Sproat got into difficulties, and that his brother wished to relieve him. Negotiations take place, and in the fourth article of the condescendence it is stated—(*reads*). Now, that bill, in its tenor and obvious import, is the debt of Thomas Sproat to Mr M'Lellan. He discounted the bill, and gave the money, which was distributed among Alexander Sproat's creditors at the rate of 15s. in the pound. What the true nature of that transaction was I will not venture to conjecture beyond what is here stated; but, most assuredly, upon this record as I read it—and if I am mistaken it is from the obscurity of the record—the averment is that the transaction was a real one, and that Thomas Sproat bought his brother's effects; but there is no statement that that was not a true transaction, or that the bill was not a true bill in the way in which it was granted—under which bill unquestionably, *ex facie* of it, Thomas Sproat became at that time the debtor of Mr M'Lellan. The first complaint made as the ground of the present action is set forth in article 13—(*reads*). Now, if that is true, what is the result? Thomas Sproat was bound to pay the bill. It was a bill granted by himself, freely and voluntarily, to this party, who was bank agent; and that in Thomas Sproat's lifetime it was the duty of Mr M'Lellan to take the effects at Brighouse and put Mr Sproat in possession of them then and there, is the ground of liability upon which this bill is sought to be extinguished, and I do not see that this ground of liability was departed from at all in the record or summons. The meaning of it must be—if you take it in connection with article 13,—not that the bill was granted as Alexander's bill, but as Thomas Sproat's bill, by which he acquired right under the contract of sale to those subjects upon the farm; and though it was intended to benefit Alexander by raising this money and taking those effects at a valuation, it was not upon the footing that Alexander was debtor under that bill or that Alexander retained a right to those effects, but it was a sale of the effects of the one brother to the other, which could have been carried out and which should have been carried out by Mr M'Lellan at the time, by taking possession of those effects and putting Mr Thomas Sproat into actual possession of them. Now, if we are asked to give judgment upon that, it is impossible for us to sustain that ground of liability. There were no grounds whatever for anything of the kind. Thomas Sproat was then alive, and if anything is clear in this case, it is that he did not wish to take the things away from his brother, but to leave him in the administration of them. That might lead to the other inference that Alexander was the proper debtor under that bill, that it was an accommodation bill to him—but that is not the allegation upon record. The allegation upon record is that it was a true transaction—a true sale, to be followed up by delivery—and that the bill was, what it bears to be, the price of those articles; and the ground of liability now is that Mr M'Lellan, without instructions, and at this distance of time, is to be held to lose the bill he discounted because he did not do the thing which it is there said he should have done. Either this was a true bill, upon a true sale, or a mere nominal bill by Thomas Sproat, truly the debt of Alexander Sproat, who ought to have paid it, — a most improbable thing for a man who was drowned in debt; but that is not the form of the action, and the conclusions appear to me to be at variance with that statement; and if this were a true sale there is nothing else in the case. To sustain that now as a ground in this action seems to me impossible. We must consider the form of the transaction, and not only so, but the form as it continued not for a very long period, but still for some months of Thomas Sproat's life, during which he took no document from Alexander to prove that Alexander was the direct debtor, and that it was really his bill though nominally Thomas's. I think Thomas Sproat meant to interpose and to do what he could to save the effects from the other creditors of his brother. Whether he meant to enforce delivery of them afterwards is a different matter, but I cannot on the face of this article assume that Thomas could have brought an action to compel Alexander Sproat to pay that bill. Certainly there were no grounds at that time for resisting payment to Mr M'Lellan, who had discounted the bill. That appears to me to stand of itself as an obstacle to our sustaining this action. I should have been very glad if this Record could have been patched up in any way to make it right; but it seems to me to be in the position of that warlike implement which required all the three parts of it to be renewed in order to make it what it ought to have been, and I think that will not do.

The only part of the case that staggers me is that in reference to the proceedings of Alexander in Australia, when he purchased these lands there. But was ever anything so serious as that libelled upon and condescended upon in the way which has been done here? There is not a word about it in the record except that it is said he intromitted with certain lands; but the documents read to us from the bar were never heard of till the record was closed, and were produced in the course of the proof. That is not the way to deal with an action of this serious kind. It ought to have been set forth on the record. Mr Brown says there was a conveyance; but I cannot see that

on record. The statements made are very confused. If the lands were sold at some loss it would be a very interesting point. The loss might arise from this, that Alexander Sproat should never have been allowed to buy them; but what has been brought forward is nothing of the kind. It is a mere matter brought in *ex post facto*, without any distinct information for which to make Mr M'Lellan liable. I have only to say that it is unfortunate so much time has been lost without any living person being in fault so far as we can see. I agree with what Lord Ormidale said as regards Mr Scott, who was a very correct man. We do not see in evidence what view he took of this matter; but he allowed it so to stand, and we have letters written which have no answers to them. He is gone and cannot explain that. Mr Thomas Sproat granted that bill. He took no document to counteract it from his brother at the time. He died without doing so. He allowed his brother to change the stock in the usual course of administration — and the question, whether he did not give this money for getting control over the effects, and then did not voluntarily leave it to his brother, is a matter very difficult now to decide; and I am not prepared to say there is sufficient evidence of donation brought forward, for I cannot get at the merits of the case from the way in which the record presents it. We have no clear or distinct ground upon which to interfere: and if we have any ground it is that it was a true sale, and that Mr M'Lellan's breach of duty occurred in Thomas Sproat's lifetime, which I think is entirely excluded by the circumstances of the case. On these grounds I am unable to give effect to the views very ably maintained by the Lord Ordinary, which do not appear to me to be reconcileable with the record or with the facts of the case.

Lord Gifford—I cannot help feeling some difficulty after the opinions which have been delivered, but after the very full consideration which I have been able to give this case, I have found myself quite unable to concur in the course which Lord Ormidale and Lord Neaves have proposed. Substantially I have come to agree with the Lord Ordinary, and I think there are elements in this record which will enable us, in my humble opinion, —though I express it with the utmost diffidence— to reach the conclusion which the Lord Ordinary has done.

The action is brought by the judicial factor appointed by the Court of Session upon the trust-estate of the late Thomas Sproat. Mr Logan was appointed in June 1873, and it then became his duty to investigate the position in which the estate stood, to do whatever was found necessary for placing it in as good a position as circumstances would permit, and to recover what funds were outstanding, and to prevent it being subject to any unjust or improper claim. He was the officer of the Court, and in the course of his duty he found— as it is very apparent he found—an estate which had been grossly mismanaged—mismanaged by the trustees,—I do not at present see by whom,— the very considerable funds of which had all been dissipated, and the affairs of the trust brought by mismanagement into very serious confusion. I make that observation as to the position of the pursuer because I cannot help feeling that in some of the remarks made, both from the bar and in the opinions which have been delivered, the record has been dealt with with excessive severity. Mr Logan necessarily was entirely unacquainted with the previous history of the trust. It was his duty to investigate so far as possible the facts connected with the management thereof, and to bring whatever action was necessary to place the trust in a satisfactory position. I cannot help feeling that great allowance must be made for him in the position he occupied, totally ignorant of the past history of this trust, and called upon after a period of 14 or 15 years to investigate and ascertain its true state. Still further, I think that under the recent statute it is not the duty of the Court rigidly to read the record to the effect of dismissing an action, if in the course of the proceedings sufficient proof is recovered to show what the true dispute between the parties really is, and to enable the Court within the conclusions of the summons to do substantial justice to the parties. I know it is common, and it is not unfair, when a record is made up by the parties themselves, who know everything about it, and when they set forth upon record facts which must be within their personal knowledge—it is not uncommon to contrast the statements on record with the proof which has been led; and I do not object to that within certain limits, though I cannot help remembering that records are not written by the parties themselves, but are diluted and perhaps transformed through several agents and perhaps counsel, and even when parties are admitted I would be tender in dismissing an action merely because of an imperfect statement on record, provided their comes out at last in the proof — without any possibility of surprise to either party—the materials for deciding the question within the conclusions of the summons. I think this our duty under the statute of 1868 — [*reads* section 29]. Now, I have come to the conclusion that without amendment, for I do not think amendment here is absolutely necessary, but in accordance with both the letter and spirit of that enactment, we can reach here the true controversy between the parties, and that we are bound to decide the question accordingly. The only conclusions which are now before the Court are conclusions by the judicial factor on Thomas Sproat's trust-estate that a certain sum contained in a certain bill of 1858 is really the debt of Alexander Sproat, and that the creditor in that bill is barred from now making the bill effectual against the trust-estate. These are substantially the two conclusions with which we have now to deal, and I don't think there is any difficulty in dealing with them if it is instructed on the evidence that there are good and sufficient grounds in law in holding that Mr M'Lellan is barred from now making that bill good against the estate. What those grounds are I shall advert to immediately; but surely it is a perfectly competent conclusion for the judicial factor upon this estate to make. He says, "I find a certain bill outstanding with Thomas Sproat's name upon it; it is not prescribed; it is now in the hands of Mr M'Lellan's executrix; she threatens to make it good against the estate; I have investigated the circumstances, and I find that this is not a debt of the estate at all, but the debt of Alexander Sproat, a trustee who was removed for very good reasons by the Court; and you, Mrs M'Lellan, are, in the circumstances which I have discovered, now barred from making good that claim against the estate." I can see no incompetency in that. No doubt the

grounds upon which Mr M'Lellan, or his executrix, is sought to be prevented making good the bill may resolve into a claim of damages against Mr M'Lellan for neglecting or mismanaging the trust; that may be true, but we are not prevented from considering it. It is establishing a counter-claim. I do not dispute it has that effect, but I do not see any incompetency in so doing. Mr M'Lellan is admittedly a creditor, for I take it that he has not been paid, unless the payment of £1000 throws some confusion on it afterwards. Well, why should he not be entitled to make it good in ordinary circumstances? A suspension was brought long ago to raise up some grounds upon which the bill should not be made effectual; but if the defence resolves into a counter-claim, and a declarator is brought against Mr M'Lellan that on certain grounds he is barred from making good his claim, I cannot conceive there is any incompetency; nor is it a good observation against the action to say that you are trying to investigate a wider question, viz., the extent of liability to which M'Lellan has subjected himself by mismanagement of the estate. That may be, but I know no incompetency in a person saying—"I have a very large claim; it may be difficult to make it good, but I will instruct in this case that at least it exceeds the amount of £1580 and interest, which you are now claiming from me." To that extent, I see no incompetency in it. And that brings me to the merits of the case, for I think that the form of the action is unobjectionable, though peculiar. Is there a claim—for I put it that way as the most unfavourable way in which it can be taken for the pursuer—is there a claim at the instance of Thomas Sproat's trust-estate and the judicial factor upon it against Mr M'Lellan and his estate exceeding the amount of the bill he holds and the interest? That is the question upon the merits which I think is involved in this action, and I will proceed to consider that question.

I have come to the same conclusion as the Lord Ordinary has done. I think Mr M'Lellan is indebted to the trust-estate a greater amount than the bill and interest thereon which his executrix holds. The grounds of that liability are stated on record in very general terms. Some of them are stated too strongly, and others, I apprehend, hardly stated strongly enough. It is said to be negligence and failure on the part of Mr M'Lellan to discharge his duty as trustee or as agent for the trust, —for although no sharp distinction is drawn upon record between his duty as trustee and his duty as agent, I apprehend it is always an element in the liability of a trustee that he holds not only the office of trustee but the office of agent for the other party; and therefore it is quite proper to state that as Mr M'Lellan's true position. The negligence with which he is charged is failure to do a number of things,—some of them certainly not very well put, but others of them sufficiently indicated. For example, one of the first grounds is that he failed as Thomas Sproat's agent to put Thomas Sproat in possession of the stock which he bought by that *ex facie* sale. I do not think that was a good ground, and I do not think it was ultimately insisted upon at the bar, but the statement of a bad ground will not destroy an action if there are good grounds of action besides. I do not notice all the grounds brought forward in the action, but I will mention one or two of them. The failure to put the bill into the inventory is a bad ground. The bill was plainly not a bill which could be put into the inventory of Thomas Sproat's estate, because it was a debt of Thomas Sproat; but what is really meant is that Mr M'Lellan had not put into the inventory the claim which Thomas Sproat had against his brother Alexander. Even that is not a very broad ground. I never heard of a person being made responsible for a debt solely on the ground that he had not put it into the inventory; that can be amended at any time, for there may be any number of ekes to an inventory, and the mere fact that he had not put it in is not a ground of liability on which he shall be deprived of his right to recover a debt which *ex facie* is due to him. And so with various other matters,—such as failure to take proceedings, and neglecting to raise an action. All these may be elements in the liability, but the clause of indemnity to which Lord Ormidale has referred, and other considerations applicable to such a case, would go far to exonerate Mr M'Lellan from personal liability for this debt if that was all that could be alleged against him. I come at once, without hesitation, and without detaining your Lordships further upon the details of the case, to what seems to me to be the real and sufficient ground on which Mr M'Lellan shall be held liable to the trust-estate—for I still put it in this form—in a greater amount than the £1580 for which he is creditor; and that is not that he has neglected anything—not that he has omitted to do anything—all these may be make-weights in the case—but that he has actually intromitted with the estate by what the law holds, and has always held, to be actual intromission; and has handed over very large sums by his own act to Alexander Sproat, his co-trustee, not only without making any provision for payment of the debt which Alexander Sproat was due to the trust-estate—not only without taking the least security that that debt should be made good, but without taking any security whatever from Alexander Sproat, who was paid far more than his share in his brother's estate, and by whose receipt of the money—for it was virtual receipt of that money—the trust-estate has lost I am afraid to say how many thousand pounds.

The liability, then, which I think has been proved against Mr M'Lellan is a liability for actual intromission, and for unwarrantable and illegal payment to a beneficiary who was not entitled to that payment, without taking any security from that beneficiary either for the debt the beneficiary was due to the trust, or for the interests of other beneficiaries who have been prejudiced. Now, see how this stands. In the first place, I agree with both your Lordships that the transaction of 1858 really meant that Thomas Sproat became a creditor of his brother Alexander for the sum which he raised and advanced for Alexander's benefit. I cannot read the document otherwise. Alexander Sproat got into embarrassed circumstances. He was threatened by his creditors, and he applied to his brother, who had made a fortune in Australia. His brother agreed to help him, and the mode in which the help was given was this, "You, Alexander, shall make a trust-deed for behoof of your creditors, giving up your whole property to a trustee. I shall buy back that property, and with the proceeds your creditors shall be paid off and discharged. Thus you will be set afloat again with my money, and get the whole stock and everything as if you had bought it back."

Looking at the real transaction, or rather the formal deeds, though the formal deeds are not inconsistent with the transaction, I hold it to be perfectly clearly proved that Thomas Sproat agreed to buy his brother's stock and cropping back from his creditors, and to allow him to continue in possession of his farm. But what is that plainly but the interposition of a friend?—that for the benefit of his brother Thomas becomes his creditor to pay off his brother's creditors,—not that he became in form creditor in the bill. The substance of the transaction is Thomas Sproat interposing his credit to raise the money from the bank. The money is applied solely for Alexander's benefit, and the result is that Alexander is still debtor to his brother for the amount which had been raised. The letters which passed between the brothers are perfectly unambiguous. It is not possible to read them without seeing that Alexander was asking a favour. He said, "I will make you quite safe; if you cannot be made safe by this assignment of the stock I will assign you the lease, and if any subsequent profits are made from the farm you will get the benefit." And then as to the letter after Thomas Sproat's death between Mr M'Lellan and Alexander Sproat, the thing is equally clear. Mr M'Lellan is aware of the whole transaction, but tells Alexander, "You know you are your brother's debtor for the amount of the bill." He says in one of the letters, "I am perfectly conversant from the first with all the circumstances, and there is no alternative; we must give up this as a debt,"—just as if he had said, "It is a pity your brother did not leave more money, but he did not do it, and therefore it is a debt." There were other two debts due by Alexander to his brother. There was a bond for £300, and a bill for £120, upon both of which interest was due, and these are given up in inventory, so that matters stood thus when the trust began:—Alexander Sproat was due his brother, first, £1580 on bills: second, £300 upon bond; and third, £120 on the bill,—I am speaking from memory,—in all somewhere about £2000; but then Alexander Sproat was one of the residuary legatees of his brother Thomas, and was entitled in absolute fee to one third of the free residue of the estate. I see from a state which may perhaps give a little more favourable view to the succession that the residue was estimated to produce between £15,000 and £16,000, and Alexander's third share of the residue would therefore be at least £5000. Now, here were abundant grounds for settling everything. On the one hand, Alexander Sproat was due his brother and his brother's estate about £2000; on the other hand, he was a legatee under the trust to the extent of £5000. What was the duty of the trustees in the circumstances? Not to raise actions or to do diligence—to use a familiar expression, they had the bank in their own hands, they had full means of payments, they could pay the debts by retention, as soon as the estate was realised,—for part of it was in Australia, and was to be realised by a separate set of trustees,—and they had means to recover from Alexander's share the debts due by Alexander to the trust. I think it cannot be doubted that that was the duty of the trustees. If by any accident the estate for which the trustees were not responsible was lost a different state of matters would have occurred, but I do not think that there is that. A different course of management was adopted. I do not blame Mr M'Lellan or any of the trustees for mere abstention from taking proceedings against Alexander Sproat; I do not think they were called upon to do anything whatever but to keep the money to which he was entitled until it could be ascertained, and then to pay up under deduction of the debt. That is the simple ground upon which I rest my conclusion in this case. If a legacy of £1000 is left by a truster to a person who is indebted to him in £500, what is the duty of the trustee? To pay the legacy no doubt, but to keep off the debt. It is a very simple duty, and if the trustee pays the legacy in full and does not obtain the debt, and the debt is lost, I do not think it is very hard measure that it should be said to the trustee in such circumstances "You should not have done it, and you are liable." Now, what did Mr M'Lellan do? I acquit him of all blame, and lay out of account his not putting the bill in the inventory, though I cannot help thinking it is suspicious, looking to the history of the case. I acquit him of all blame as regards raising an action of declarator. It is quite possible that Thomas Sproat intended at a future period to make his brother a present of the bill, but dying as he did during the currency of the bill, we can only say that he interposed his credit, and probably he thought that it would be time to arrange about the matter when it came to the actual uplifting of the bill from the bank. Well, it this is a debt due by Alexander Sproat,—and I assume it is so,—Alexander is not here to dispute it,—how should Mr M'Lellan have acted? No doubt he was only one of four trustees, one of three trustees originally, though afterwards other two trustees, both Sproats, were assumed. It would have been far better had he kept some of those Sproats out of the trust and had independent trustees. But at the time he was one of three or one of four. They had nothing to do with the realisation of the Australian estate: That was committed to two Australian friends of the truster under a separate deed, and the duty of the trustees in Australia was to realise the estate there and hand over the proceeds to the trustees in this country. Now, Alexander Sproat, who had mismanaged his farm in Scotland, seems to have thought he could do something handsome in speculating in Australian land; and when the Australian estate came to be realised he went out to Australia and bought land apparently to the amount of £8699. The Australian trustees said, "We will give you the land, but we must have the money." Alexander Sproat seems to have said, "I have not the money, but I have large claims upon the Scotch estate; I will give you my draft upon the Scotch trustees," and he did so. And therefore the Australian trustees, by their agent, wrote to Mr M'Lellan that the sale was not made on credit, but that Alexander had purchased for cash. Now, that came home to the Scotch trustees, and the Scotch trustees accepted this draft as cash. I hold that is both in law and in fact actual uplifting of money by the trustees. They gave a receipt to the Australian trustee as for cash. This in substance, as well as in form, comes to be—We have got £8699 as the price of the Australian land, and we hand it over to Alexander Sproat. No doubt they backed this by making Mrs Thomson liable for half of it by a number of cross receipts; and here is a receipt by Alexander Sproat for £4300 odds, the reason being that Mrs Thomson was expected to give a similar receipt for the other half, but nothing could be more unlikely. They were bound to pay cash. If they had not cash home to the full

extent, perhaps an arrangement might have been made with Alexander Sproat, but he should only have received the ultimate balance due to him, viz., £5000, less £2000 due. But, instead of that, they actually gave him £8699, and £4300 is stated to be the half of it, the sum for which he gives an actual receipt to the trustees. Now, what becomes of this Australian purchase? Mr Sproat got, I think, nearly £4000, for there was only £5000 worth to be sold. He got a conveyance of everything that was not to be sold, and we find in the evidence that he gave securities over these very Australian lands to the Bank of Scotland for an independent debt. It is plain that Mr Sproat got considerable funds on the credit of this cash draft sent home by the Australian trustees; but then, when the lands are sold, there is not so much loss after all. If I understand the account the total loss under the sale was only £2805, and after that another draft was passed—but I speak under considerable correction, for there is a great deal of confusion in this trust. But it does not matter, for if Alexander Sproat purchased lands in Australia he did so as an individual, and if he purchased for £8000 it would be nothing to the purpose to say that they were sold for £2000 less. They were purchased in January 1861, and not resold until December 1862, and therefore they may have been worth £8000 when he bought them, though when he sold the half of them brought only £2500. But, as I say, I don't think that material. The material point is this, that while the Australian trustees should have got £8600, instead of getting that money, they took Alexander Sproat's draft, by which Alexander Sproat really got that sum put into his pocket by the trustees. Now, Mr M'Lellan did that. He signed the receipt. I do not think it is a sufficient defence to say that the other trustees concurred. Mr M'Lellan was agent for the trust; if he had declined to do that, how does it appear that the other trustees would have concurred? How does it appear that he protested against giving any part of the trust-estate gratuitously into the hands of Alexander Sproat, a man in embarrassed circumstances, whose property had to be bought back for him? I cannot justify Mr M'Lellan from liability on this account. There is a great difference between intromission and mere omission. The clause of indemnity might protect omission and would not protect commission, and therefore I think it is clear that Mr M'Lellan is liable—it may be conjointly and severally with the trustees, but most justly for the trust he mismanaged. The result is not far to seek. Alexander Sproat seems to have received considerable sums. I think it appears in evidence that he got in cash £3442, and the result is, that Alexander Sproat, who very soon after that became sole trustee upon this unfortunate estate, again becomes bankrupt, and the judicial factor has to rank upon his estate as representing Thomas Sproat's trust-estate, and the debt is £14,300. His whole interest in that estate never exceeded £3000. I am assuming that his third of the residue was £5000, and he never should have got more than £3000. Now, was there anybody or nobody responsible for that? I cannot doubt that those trustees are all and each of them, conjunctly and severally, liable for the state into which the trust-estate got; and Mr M'Lellan is one of the trustees—a professional man, who was bound by every tie of duty to look after the estate. I am very sensible of the considerations which Lord Ormidale has referred to as regards being indulgent to trustees and not stretching liability. If any trustee says that he will accept a draft for £8000 as cash, he must know that if that money is lost he will be liable. Well, what follows? Actions were brought. Mr Sproat apparently defends them. There is a Mrs Kerr to whom £3000 was bequeathed. Apparently money has been got somewhere to meet that claim. Mr M'Lellan, immediately after his resignation as trustee, raised his action in respect of this bill, and arrested that £3000. It is not stated what the result of that was. The trustees suspended the decree in absence which Mr M'Lellan had obtained, and he did not persist in his claim, but he wrote a letter to Mrs Thomson, saying that this £1500 was due to him for having lent money to Thomas Sproat to buy the lands of Tonguecroft. I cannot look upon that as other than a falsehood. It put everybody off the scent. Mr Scott was put off the scent. He was told the same story, and he complains bitterly of being misled in one of the letters, where he says to the son, "Your father told me it was for Tonguecroft." Well, this money has been all lost. If this had been an action against the trustees I cannot doubt that they would have been held responsible conjunctly and severally for what has been lost by its mismanagement. Is it too late yet? Who has been the party to blame? Mr M'Lellan and Alexander Sproat most, and they are both here. The other trustees are dead or resigned. I do not think there is any incompetency in bringing up the matter, and I do not think the judicial factor could have done otherwise. But it is said there is a docqueted account. I do not find any such docqueted account except one, which is docqueted by Alexander Sproat himself to Mr M'Lellan's executrix. There is a letter by Mr Andrew Scott, who was agent for the trustees, but I do not think that can be considered as an account. The agent for the trust says that it seems to be correct, but it is proved now not to be correct, and that there is a large outstanding debt, and that this bill of £1580 does not appear, and therefore it makes a different case of it altogether. When Mr Scott wrote that letter he was under the belief, induced by Mr M'Lellan, that this £1580 was half the price or some part of the price of Tonguecroft. I cannot hold Mr Scott bound by that letter, and as to the formal account it is, by Alexander himself, dated 4th May 1870,—it is quite impossible to hold that a docquet by Mr Alexander Sproat, who is the wrongdoer, to Mr M'Lellan, who allowed and enabled him to do wrong, is to foreclose this action at the instance of the judicial factor to put things right. It was pleaded that there should have been an action of reduction, but that was not pleaded till after the proof, and the Lord Ordinary says the plea could not be maintained because it was not pleaded in the record. We are here on the whole matter of Mr M'Lellan's liability, and that is not foreclosed or excluded in any way by that docquet or by Mr Scott's letter; and so the Lord Ordinary observes that the account founded on cannot be held to preclude the present action.

On the whole, therefore, while I feel very diffident in the opinion I have reached, I cannot help thinking that I have some confidence in the opinion that there is here libelled sufficient to negative Mrs M'Lellan's right to recover this bill, because by her husband's actings the estate has been deprived

—by his actings and omissions,—of three times the amount of the bill.

Lord Justice-Clerk—My Lords, my brother Lord Gifford has said that he feels some confidence in the opinion which he has expressed, though it differs from that of two of your Lordships. I wish very much that I could come to any result of which I could say that, for I have felt the greatest possible difficulty in regard to this matter. I shall shortly state the result at which I have arrived, which is this,—that I am content to acquiesce in the opinion of the majority of your Lordships, but with this addition, that I come to this conclusion more upon the merits than upon any point of pleading, and if I had found here in the proof any sufficient ground for the liability maintained against the representatives of Mr M'Lellan, I do not think the record would have prevented me from giving effect to that.

In the first place, however, I may say that I think the action is a very peculiar one, and that the pursuer here, from some cause or other,—perhaps from not wishing to make his claim larger than necessary for the emergency—has embarrassed himself very greatly as regards the real substance and merits of his demand. His demand against Alexander Sproat is plain enough, but when he comes to the representative of the trustee, the first conclusion,—really the one we must deal with,—is of this nature, that in respect that the representative of the trustee holds an illiquid debt against Thomas Sproat's estate to the extent of £1580, the representative is barred from making that out because he is due a greater amount. Now, it is admitted that that could not be pleaded against a liquid document of debt in a suspension; and if the defenders are barred from making good the debt, it is only because they are due in legal debt to the estate. But, my Lords, I do not see the logic of a declarater that a claim which is illiquid can be pleaded against compensation for an illiquid claim, and I doubt very much if it be competent procedure at all, because the grounds are nothing but these, that there is an illiquid claim sufficient to meet the claim of damage alleged to be recoverable in the suspension, which cannot be pleaded as a ground of competency. I doubt whether decree in terms of the summons would amount to a constitution of the debt, but I am willing to assume for the present that the real substance of the demand is a demand to have this claim constituted, as least to the extent of the £1580 bill. Now, if I were asked to find that the ground of that claim is what Lord Gifford so strongly alluded to,—namely, the acceptance of Alexander Sproat's draft as so much cash for the price of the Australian property, I should be compelled to say at once that no such ground as that is to be found from one end to the other of this record. That is not the ground upon which the action is brought at all, and I wish to be understood that so far as relates to the claim of the other parties on this estate, so far as relates to their claim against the trustees for what they did in that matter, I give no opinion whatever, for I do not think that is raised by or embraced in this transaction at all. Neither do I think that there is anything stated in this record which by itself would come to this, that the trustees had paid away improperly the £1580 to Alexander Sproat. The action is based upon another and a very intelligible ground. It is simply this, that this sum, this bill for £1580, was granted for behoof of Alexander Sproat, and that he was liable in relief to the estate, that the trustees were bound to have made that debt effectual, and that they neglected to do so. I think that ground is sufficiently stated in the record. I do not concur in the criticisms made upon it to the effect of holding that that ground is not to be found there. There is some confusion between the title to the stock and the right to relief in the bill, but I think these are sufficiently put alternatively to enable us to deal with the substance of this bill. In regard to the transaction of 1858, I do not think there is much doubt as to its real nature. It was not a purchase of the stock for behoof of Thomas Sproat. Thomas Sproat interposed and took a title to the stock for the creditors as trustee, and for behoof of his brother. I do not think Alexander's title to the stock was ever altered at all. The trustee, as very often happens, himself advanced the price, and he had undoubtedly a right to recover that from the party from whom he bought it, and therefore I think it is a pity that we should be encumbered with the idea that Thomas Sproat was the holder of the property of this stock; and that he could have recovered his money from his brother I cannot doubt. The next point is this, that Thomas Sproat took no obligation from his brother. He must have been able to prove by his letter the footing on which he interposed, but he took no document of debt, and died without taking a document of debt, leaving a settlement, and under that settlement he leaves to his brother one-third of his whole property, and says not one word of this advance of £1580. That being the state of matters, he dies within ten months of the transaction, the trustees take possession, and we are now, at a distance of 15 years, called on to say that one of the trustees is liable to the trust-estate for this sum of £1580, because it was not made effectual against Alexander Sproat. That is the whole question. If that were a debt which they were bound to recover, it is a good ground of action, but I am of opinion that it was a sum they were not bound to recover. If it was a debt which they were bound to bring in as part of his trust-estate they were bound to do it at once. They were not entitled to let it hang over. They were as much bound to recover that debt as to recover the other two debts that stood on liquid documents of debt, but I have come to the conclusion on the whole matter that the trustee not unreasonably inferred that Thomas Sproat never intended his brother to lie under a legal obligation for this money at all. If he had he would have taken a document of debt, and he took no document of debt. He left no instructions to his trustees to recover, and I am of opinion—and it is only on that ground that I have come to coincide with the majority of your Lordships—that the trustee was not guilty of any negligence in refraining from recovering it; that they were not bound to recover it; and that it was never intended to come into the category of legal obligations. If that be so, there is an end to the case. The proceedings in regard to the Australian estate may or may not be indefensible, but that is not here. Unless there was an obligation on the trustees to make good this debt as one of the assets of the estate as against the debtor, I apprehend that the ground of action fails, and on that ground, and that ground only, I am prepared to acquiesce in your Lordships' judgment, but I think that instead of merely sus-

taining the first plea in law we should find that no relevant or sufficient statement has been made or proved to support the conclusions of the summons.

The Court pronounced the following interlocutor;—

"The Lords having heard counsel on the reclaiming-note for Mrs Frances Sophia Rainsford or M'Lellan against Lord Shand's interlocutor of 6th August 1874, Recal the said interlocutor, and find that no relevant or sufficient statements have been made or proved to support the conclusions of the summons as against the defender Mrs M'Lellan; therefore dismiss the action as against her, and decern; find her entitled to expenses, and remit to the Auditor to tax the same and to report."

Counsel for the Reclaimer (Defender)—Asher and Robertson. Agents—Gillespie & Paterson, W.S.

Counsel for the Respondent (Pursuer)—Dean of Faculty (Clark), Q.C., and W. A. Brown. Agents—Mitchell & Baxter, W.S.

Tuesday, January 19.

FIRST DIVISION.

[Lord Mackenzie, Ordinary.

HUME AND OTHERS *v.* YOUNG, TROTTER & CO.

Process—Jury Trial—Competency—Nuisance—Judicature Act, 1825, § 28—*Procedure Act*, 1850, § 49—*Evidence Act*, 1866, § 4—*Court of Session Act*, 1868—*A.S. 10th March* 1870.

Held that in an action for nuisance the case must be tried by a jury unless both parties consent that it should be tried otherwise, or on "special cause shown," and that in every case it is a question of circumstances whether or not there is "special cause."

Jury Trial—Special Cause—Evidence Act, 1866, § 4.

Circumstances in which *held* that special cause had not been shown why an action for nuisance should not be tried by jury.

This was an action brought by certain reparian proprietors on the banks of the Whitadder for interdict against the owners of the Chirnside paper mill, to prevent them from polluting the stream, so as to render it unfit for primary uses.

The pursuers moved the Lord Ordinary to take the proof himself, whereas the defenders maintained that it should be tried by jury.

The Lord Ordinary (MACKENZIE), reported the case to the First Division, and pointed out that the question must be governed by the interpretation of the provisions contained in 6 Geo. IV., c. 20, § 28; 13 and 14 Vict., c. 36, § 49; 28 and 29 Vict., c. 112, § 4; 31 and 32 Vict., c. 100, § 27, subsections 3 and 4; Act of Sederunt, 10th March 1870, § 1, subsections 3 and 5.

The pursuers argued that it was quite competent for the Lord Ordinary to take the proof himself. This was a case in which such a course was advisable, for (1) There was a plea of prescription which was founded not only upon the use by the defenders when the mill was in its present situation, but when it was several miles further up the river. (2) There was a plea founded on pollution of the river from other sources, such as to render it unfit for primary uses, and extending over the prescriptive period. (3) A great amount of scientific evidence would require to be led. In these circumstances a jury were not so well qualified to judge as the Lord Ordinary.

The defenders argued, the Lord Ordinary could take the proof in a case of this description, but only (1) On the motion of both parties; or (2) Upon special cause shown. Here there was no special cause, but the case was one peculiarly fitted for trial by jury.

At advising—

LORD PRESIDENT—Under the 28th section of the Judicature Act there is an enumeration of causes which are required by the statute to be tried by Jury. The first relaxation of that rule is contained in the Act of 13 and 14 Vict., c. 36. The 49th section of the Act provides—"That in any cause before the Court of Session, not falling within the causes specially enumerated in the Judicature Act as appropriate to be tried by Jury, it shall be competent to the Lord Ordinary, before whom such cause depends, with the consent of both parties, or upon the motion of one party, with leave of the Inner House obtained upon the report of the Lord Ordinary, or to the Court when the cause comes into the Inner House, to appoint the evidence in such case, or any portion of such evidence, to be taken by commission: Provided always, that it shall be competent for the Court to allow proof on commission in any of such enumerated causes where the action is not an action for libel or nuisance, or properly and in substance an action of damages."

It is obvious that the Legislature in passing this enactment thought that actions of libel, nuisance, and damages should not be tried in any other way than by Jury. The only alteration made on the rule since the enactment I have just quoted is contained in the 4th section of the Act 29 and 30 Vict. c. 112. It is there enacted:—"If both parties consent thereto, or if special cause be shown, it shall be competent to the Lord Ordinary to take proof in the manner above provided in section first hereof in any cause which may be in dependence before him, notwithstanding the Act passed in the sixth year of the reign of His Majesty King George the Fourth, chapter one hundred and twenty, section twenty-eight, and the provisions contained in the Act passed in the thirteenth and fourteenth years of the reign of His present Majesty, chapter thirty-six, section forty-nine, and the judgment to be pronounced by him upon such proof shall be subject to review in the like manner as other judgments pronounced by him."

Here, then, is a further relaxation of the rule, and it is made competent to try the class of cases before restricted to trial by Jury without a Jury on condition either of consent of parties or if special cause be shown. There is apparently nothing in the Court of Session Act of 1868, or in the Act of Sederunt following thereon dealing with this matter, and therefore I am of opinion that we can lay down no general rule for the guidance of the Outer House in cases of this sort, for the Lord Ordinary can proceed only on consent of parties or on special cause shown in the particular case. I confess I can't see anything special in this case, and unless special cause is shown we are bound to