motion, but subject to this condition that the specimen of the paper and the specimen of the ink be taken at the sight of the Professor of Chemistry in Edinburgh University, and that he shall be satisfied, before there is any interference with the document, that the examination to be made by the pursuers' experts will not in any way affect the continuing legibility thereof.

We shall frame the interlocutor so that both parties shall secure the advantage.

LORD MACKENZIE—What we are asked to do here is to sanction a novel experiment—at least we have not been referred to any case in which such a proposal has been sanctioned.

I am bound to say that at first I was inclined to the view that this motion should not be granted upon mere averment, and that it would have been more prudent to have advanced the case up to the point of having evidence before the Judge trying the case to satisfy him that there was a reasonable prospect of this experiment proving of value in the case. But one quite recognises that that could only have been possible because of the accidental circumstance that this case is to be tried by way of proof, for if the case had been set down for jury trial one would have required to face the question *ab ante* on mere averment. Accordingly I concur in the course which your Lordship proposes.

At the same time, my view is that the expert should be satisfied not merely that what is done to the document should not affect the continuing legibility of the writing, but also that it should not affect the document as an item of evidence in the cause, because it may be necessary in the last resort for the Court, by an examination of the document, to come to a conclusion on the issue in the case. Therefore in my opinion the attention of the expert should be specially directed to that in the interlocutor to be pronounced.

LORD SKERRINGTON—I agree. I have only one observation to make which I understand is not inconsistent with the view entertained by your Lordships, namely, that if an opportunity is to be given to the pursuers to make experiments, either with a portion of the paper of which this document consists or with a portion of the ink removed from the document, similar facilities must be given to the defenders, otherwise the pursuers' experiments would be of no evidential value, and an injustice would be done to the defenders.

LORD JOHNSTON was absent.

The Court pronounced this interlocutor—

"Recal said interlocutor [of the Lord Ordinary]: Authorise the pursuers and compearing defenders by their respective experts, in the presence of the Depute-Clerk Register or of his depute, and at the sight of Professor James Walker, D.Sc., Ph.D., Professor of Chemistry in the University of Edinburgh, to have access to the will of the deceased Elizabeth Powrie mentioned in the summons and said minute, and to take therefrom (1) such parts of the paper and of the surface thereof as are not written upon, and (2) so much of the ink or other material forming the alleged writing, as may be considered for the purpose of chemical or other examination necessary to enable them to determine and prove the means used in producing the said document, subject always to the condition that the said Professor James Walker shall be satisfied that any interference with the said document by the experts of the parties shall not affect the value of the document as an item of evidence in the cause or the continuing legibility thereof: Find the expenses of the reclaiming note to be expenses in the cause: Remit to the Lord Ordinary to proceed therein as accords."

Counsel for the Pursuers (Reclaimers)—Watt, K.C.—D. Jamieson. Agents—Alex. Morison & Company, W.S.

Counsel for the Defenders (Respondents) and for Lord Clerk Register—Cooper, K.C.—Morton. Agents—Sharpe & Young, W.S.

Thursday, July 15.

SECOND DIVISION.

MACPHERSON'S JUDICIAL FACTOR v. MACPHERSON AND OTHERS.

Assignation—Trust—Effect of Assignation—Administration of Trust—Assignation of Interest in Trust Estate by a Trustee who Subsequent to Date of Assignation and Intimation Withdraws More than his Interest.

A trustee on a trust estate in which he was a beneficiary assigned to his marriage-contract trustees his interest up to a certain amount in the trust estate, and this assignation was duly intimated to the trustees. He subsequently overdrew the share due to him under the trust to such an extent that the balance was insufficient to meet the claims on the estate and the sum assigned. *Held* that the marriage-contract trustees were not barred by the intromissions of their cedent, the trustee, from claiming a *pari passu* ranking with the other beneficiaries for the sum assigned, and that the rule of English law whereby the assignee would have been affected by the intromissions of the trustee even when subsequent to the assignation and its intimation has no place in Scots law.

Observed per Lord Johnston that where a will gives trustees power to make advances, they will exercise that power subject to personal liability if after an assignation has been intimated to them they do not retain in their hands a sufficient sum to make good the amount assigned.

Thomas Smith, C.A., Glasgow, judicial factor on the trust estate of the deceased Archibald Macpherson, spirit merchant, Glasgow, *first party;* Mrs Mary J. M. Macpherson or Mackay, wife of Daniel D. Mackay, Dunblane, with her husband's consent and concurrence, and others, the surviving children of the testator, and those in their right, *second parties;* and Francis Patrick Long, solicitor, Dublin, and another, trustees acting under the marriage settlement of Hugh Peter Macpherson, a son of the testator, and his wife, *third parties,* brought a Special Case for the opinion and judgment of the Court as to the right of the third parties to payment from the first party of £1000 as in a question with the second parties.

The Case stated, *inter alia*—"By the third purpose of his *trust-disposition and settlement* the testator directed his trustees to pay over to his wife, in the event of her surviving him, the whole annual produce and rents of the residue of his estate under burden of maintaining and educating the children of the marriage. By the fourth purpose the testator directed that on the death of his wife the trustees should 'hold, apply, divide, and convey the whole residue and remainder of my means and estate, heritable and moveable, real and personal, to and for behoof of my children, equally among them, and such provisions shall be payable, in the case of sons, on their respectively attaining to majority, . . . and declaring further that it shall be in the power of my trustees to advance and pay, before the arrival of the term of payment, to and for behoof of my children, or any of them, any part not exceeding in all one-half of the fee or capital of the provisions hereby made in their favour by way of capital wherewith to commence business, or for outfit on marriage, or otherwise for behoof of my children, but only with consent of my wife during the subsistence of her liferent.' . . .

"The testator was survived by his wife Mrs Margaret Macdonald or Macpherson (hereinafter referred to as 'the liferentrix'), and by six children of the marriage, viz., Hugh Peter Macpherson, James Aloysius Joseph Macpherson [and four others]. . . . The testator's widow Mrs Macpherson died on 27th April 1908. Hugh Peter Macpherson died on 15th November 1912, and Archibald Joseph Aloysius Macpherson in August 1911. . . .

"The original trustees appointed by the testator under the said trust-disposition and settlement were the liferentrix, James Stewart, writer and banker, Glasgow, and John M'Lean of Glenuig, Strontian. By deed of assumption dated 15th February 1893 the said Hugh Peter Macpherson was assumed as trustee and acted as such until his death. The said Archibald Joseph Aloysius Macpherson was also assumed as trustee, conform to deed of assumption in his favour dated 18th and 31st January 1908. The said James Stewart died on 30th December 1903, and the said John M'Lean died on   1893, each having continued to act as a trustee until his decease. The said Hugh Peter Macpherson and the liferentrix acted as sole trustees from 30th December 1903 to 31st January 1908, when the said Archibald Joseph Aloysius Macpherson was assumed as aforesaid. From the date of the death of the liferentrix on 27th April 1908 as aforesaid the said Hugh Peter Macpherson and Archibald Joseph Aloysius Macpherson acted as sole trustees. On the death of the said Archibald Joseph Aloysius Macpherson as aforesaid in August 1911 the said Hugh Peter Macpherson became sole trustee, and he acted as such until his death as aforesaid on 15th November 1912. The first party was thereafter appointed judicial factor on the petition of certain of the testator's surviving children, conform to act and decree in his favour dated 6th December 1912. . . .

"By marriage settlement dated 31st January 1902, and executed according to the forms of Irish law, the said Hugh Peter Macpherson, in view of an intended marriage between him and Miss Alice Long, Dublin, . . . assigned to the trustees [of his marriage settlement] one undivided sixth part or share of the said residue [in his father's estate] to which he was entitled as aforesaid, but that only to the extent of £1000. . . . The said marriage settlement was duly intimated to the trustees of the testator on 12th April and 12th May 1902. . . .

"The third parties now claim payment from the first party of the said sum of £1000 with interest thereon . . . from the date of her death. The estate in the hands of the trustees of the testator at the date of the said intimation was more than sufficient to meet the said sum of £1000 on account of the interest of the said Hugh Peter Macpherson after allowing for the sum of £650 advanced to him prior thereto as after mentioned.

"In the course of the administration of the estate various advances of capital were in the exercise of the powers contained in the trust deed made by the trustees to the testator's children through the hands of the law agents in the trust. These advances so made amounted in all to £3400, and were all made with consent of the liferentrix with the exception of £100, which was paid to the said Mrs Mackay after the liferentrix's death. These advances were all duly authorised by the trustees. Of this sum of £3400 £650 was advanced to the said Hugh Peter Macpherson, and said sum of £650 was advanced to him prior to the date of the said intimation of the marriage contract. The said sum was advanced to the extent of £250 in 1899, when the same amount was paid to each of the other members of the family, and £400 in view of his marriage. In addition to the said advances of £3400 made to the testator's children as aforesaid, further sums amounting to £5791, 15s. 6d. were withdrawn from the trust funds by the said Hugh Peter Macpherson and Archibald Joseph Aloysius Macpherson while acting as trustees, to the extent of £2630, 8s. 7d. for and on behalf of the said Hugh Peter Macpherson, to the extent of £1813, 18s. for and on behalf of the said Archibald Joseph Aloysius Macpherson, and to the extent of £1347, 8s. 11d. for and on behalf of their brother and sisters, and as to which last sum no

question arises in this case. The said withdrawals, amounting to £5791, 15s. 6d., were not authorised by any minute of the trustees or by the other beneficiaries.

"The whole purposes of the trust have now been carried out except the final division of the estate among the family of the testator or those in their right. The assets of the trust have been realised, or are in course of realisation. The total residue for division, including sums advanced to beneficiaries or due by them to the trust, will amount approximately to £12,216 (subject to expenses), one-sixth equal part of which amounts to £2036. The sums advanced to or withdrawn by the said Hugh Peter Macpherson from the trust funds amount to £3280, which is in excess of his one-sixth share by £1244. The advances made to the said Hugh Peter Macpherson prior to the said intimation of his marriage settlement to the trustees amount as aforesaid to £650, and the sums drawn by him prior to the said date as aforesaid to £6, 6s., leaving a balance due to him as at the date of the said intimation of £1379, 14s. No other money was due by him to the trust at the said date. . . .

"In these circumstances questions have arisen as to whether it is the duty of the first party to admit the said claim of the third parties as assignees of the said Hugh Peter Macpherson and to allow them to rank preferably or otherwise for the amount of their claim, or to reject the said claim on account of the depletion of the trust estate through the intromissions of the said Hugh Peter Macpherson with the trust funds, and of the advances to him. The said Hugh Peter Macpherson left no estate.

"The second parties *maintain* that the first party is bound to set off against the sum due by the trust estate in respect of the said Hugh Peter Macpherson's share the whole of the sums advanced to him or withdrawn by him out of the trust estate, and that as the advances made by the trustees to the said Hugh Peter Macpherson and the sums withdrawn by him from the trust estate exceed the amount of his share, the claim of the third parties is excluded. In the event of its being held that the third parties are entitled to a claim on the trust estate in respect of the said obligation of the said Hugh Peter Macpherson and the said assignation or charge upon his interest in the said trust estate and intimation thereof, the second parties maintain that the third parties are not entitled to any preferable ranking upon or payment from the trust estate in respect of their said claim as in a question with the second parties, and are not entitled to any interest on such claim.

"The third parties maintain that the said marriage settlement operated, from the date of the said intimation, as a valid assignation to them of the said Hugh Peter Macpherson's interest in the trust estate to the extent of £1000 thereof; that they became entitled to payment of the sum of £1000 as at the date of the death of the liferentrix, and that they are creditors of the trust estate as in a question with the second parties for that sum, together with interest thereon from the date of death of the liferentrix at the rate of five pounds per centum per annum. They contend that their assignation is not affected or prejudiced by the intromissions of the said Hugh Peter Macpherson after the date of its said intimation, and that the said contention of the second parties as to their alleged right of set-off is unsound."

The *questions of law* for the opinion and judgment of the Court were, *inter alia*—"1. Are the third parties, in virtue of the assignation granted by Hugh Peter Macpherson in his marriage settlement, entitled to payment from the first party of the principal sum of £1000 preferably as in a question with the second parties? or 2. Are the third parties only entitled to payment of the said sum from the first party *pari passu* with the second parties in respect of their shares in the residue of the testator's estate? or 3. Are the third parties, in respect of the said Hugh Peter Macpherson's intromissions with the trust estate subsequent to the date of intimation of the said marriage settlement to the trustees of the testator, barred from claiming the said sum from the first party?"

Argued for the second parties—Even though the assignor was not a defaulter at the time of the assignation, if he subsequently became a defaulter his act drew back to the time when he made the assignation to the effect of rendering it invalid—*Doering* v. *Doering*, 1889, 42 Ch.D. 203; *in re Towndrow*, [1911] 1 Ch. 662; *Hooper* v. *Smart*, 1875, 1 Ch.D. 90, *per* Hale, V.C., at p. 98; Menzies on Trustees, 2nd ed., section 1075. There was no difference between English and Scots law on this matter. Intimation was only necessary to complete the title, and any difference as to intimation in the laws of the two countries did not affect the question. What was assigned in the present case was not £1000 but a share in the estate, which could only be ascertained on the death of the liferentrix, and which might be diminished before it was ascertained. The subject of this assignation was therefore a risk in the hands of the assignee, who took subject to that risk. In *Edgar* v. *Plomley*, [1900], A.C. 431, the rule of *Doering* v. *Doering* (*cit. sup.*) was assumed. There the distinction was made between where an estate was still in bulk and where a portion had been assigned and put into a separate account, and the distinction was recognised. There being no rule in Scots law to the contrary, the rule should be applied.

Argued for the third parties—The rule in question might be good according to English law, but it did not apply to Scotland. There was no mention of this principle in any Scots text book prior to Menzies on Trustees. Authority in Scots law so far as it went was all the other way—Stair, iii, 1, 6; iv, 40, 21; Erskine, iii, 5, secs. 3 and 9; *Campbell* v. *Campbell*, December 13, 1860, 23 D. 159; *Hope & M'Caa* v. *Waugh*, June 12, 1816, F.C.; *Shiells* v. *Ferguson, Davidson, & Company*, December 22, 1876, 4 R. 250, *per* L.P. Inglis, p. 254, 14 S.L.R. 172. It was

settled law in Scotland that intimation divested the cedent and invested the assignee. That being so, it was impossible to apply a rule of English law that the defalcations of a cedent subsequent to assignation and intimation affected the assignee. In any event the English rule was strictly qualified. It did not apply where there was a separate legacy assigned apart from the residue fund, or in such circumstances as occurred in the case of *Fox* v. *Buckley*, 1876, 3 Ch.D. 508.

LORD JUSTICE-CLERK—The point here is a short one. Mr Hugh Peter Macpherson was a beneficiary under his father's trust-deed, under which he was entitled to a sixth share of the residue payable, under certain conditions, on the death of his mother. In his own marriage-contract, which was executed on 31st January 1902, when he was one of the three trustees acting in his father's trust, he assigned his interest in his father's estate to the extent of £1000 to the marriage-contract trustees. At that time, the parties are agreed, there were sufficient funds in the father's trust-estate to implement that obligation. Subsequently there were various changes in the personnel of the father's trustees, and Mr Hugh Macpherson overdrew the amount which he was entitled to obtain from his father's trust estate, with the result that, when that estate came to be divided, instead of his being entitled to receive anything from it, he was indebted to it in a considerable sum and had no funds with which to meet that debt.

The question now arises whether his assignees under his marriage-contract are entitled to get anything out of the father's trust estate or whether the whole balance of that estate must go to the other beneficiaries. These other beneficiaries, the second parties, founding upon what seems to be quite settled law in England, maintain that the assignees of Mr Hugh Macpherson must submit to being charged with the whole sums which he drew from his father's trust estate after the date of the assignation, on the ground, apparently, as it is put in the law of England, that by a legal fiction he is presumed to have got these sums paid to him in anticipation of his share of the estate including the portion assigned. On the other hand, the argument for the marriage-contract trustees is that the intimation of the marriage contract, with the assignation therein contained, effectuated a complete divestiture of Mr Hugh Macpherson to the effect that the interest of the marriage-contract trustees under his marriage contract could not be prejudicially affected so far as the residue of his father's trust estate was concerned.

Now I do not profess, of course, to be an expert in English law, but I take it as settled by the cases which have been cited that that rule of English law is firmly established. But it has never been recognised in Scots law, and it seems to me to run counter to one of the fundamental rules of our law in regard to assignations. I think that the statement of the law by Lord President Inglis in the case of *Shiells* v. *Ferguson, Davidson, & Company*, 4 R. 250, at p. 254, to which we were referred, is correct and rules the question raised here. The Lord President says in that case—"The principle is that an assignee is liable to all pleas competent against his author when the assignation was made. A claim emerging subsequently has never been held competent to be pleaded against the assignee; but the assignee is certainly liable to all pleas maintainable against his author at the date of the assignation."

Accordingly I am of opinion that the questions in this case should be answered as follows:—The first question was really not argued, and it was conceded that it should be answered in the negative; the second question ought to be answered in the affirmative; and the third question should be answered in the negative.

LORD DUNDAS—I am of the same opinion as your Lordship upon all points, and have nothing to add.

LORD JOHNSTON—I agree with both your Lordships. I think that the law of Scotland and the law of England in the matter of assignations start from diametrically opposite bases. I think that in this matter the law of Scotland is preferable to the law of England. The object of the law of Scotland is—as in the case of heritable infeftments and heritable securities—to effect security by creating a definite system of completing title on which people can rely. Accordingly for 300 years at least it has been the law of Scotland that an assignation is of no use to the assignee until it is intimated, but that once it is intimated it gives him an absolute and preferable right to what is assigned to him against all concerned. Now that system enables, for instance, beneficiaries to borrow on their expectancy under trust, and lenders to lend with the assurance that the lenders will get the right of the cedent as it stands at the date of the intimation of the assignation. That, as I have said, has been acted and relied upon for three centuries, and I think it would be a grievious mistake if we were now to disturb that law by introducing a rule of the English law, and especially a rule which is founded on a legal fiction.

With regard to the clause of the deed on which Mr Horne founded authorising advances to beneficiaries, I would add that where a clause of the kind indicated by Mr Horne giving the trustees power to make advances to the beneficiaries exists, I think that trustees, after an assignation is intimated to them, would exercise that power subject to personal liability if they did not retain in their hands a sufficient sum to make good the amount assigned.

LORDS SALVESEN and GUTHRIE were absent.

The Court answered the first and third questions stated in the negative and the second question in the affirmative.

Counsel for the First Party — King Murray. Agents—Scott & Glover, W.S.

Counsel for the Second Parties—Horne,

K.C. — Lippe. Agents — Macpherson & Mackay, S.S.C.

Counsel for the Third Parties — Chree, K.C.—Wilton. Agent — Charles George, S.S.C.

Tuesday, July 20.

FIRST DIVISION.

[Lord Hunter, Ordinary.

WHITEHILL *v.* GLASGOW CORPORATION.

Process—Proof—Diligence for Recovery of Documents — Confidentiality — Report by Employees of Tramway Company Made de recenti of Accident—Report Purporting to be for Use of Tramway Company's Solicitors if Litigation should Ensue.

In an action of damages against a tramway company arising out of an accident, a diligence for the recovery of documents was granted in the same terms as in *Finlay* v. *Glasgow Corporation* (*supra*, p. 446). When the diligence was executed the law agent of the company refused to produce a report which he had in his possession, written *de recenti* of the accident by the driver and conductor of the car involved, on the ground that the report was confidential and was written for the purpose of a possible litigation. The report was headed "For the use of the Corporation solicitors to enable them to defend should litigation ensue." *Held* that the report must be produced — *Finlay* v. *Glasgow Corporation* (*supra*, p. 446) and *Macphee* v. *Glasgow Corporation* (*supra*, p. 772) *followed*—and leave to appeal to the House of Lords *refused.*

On 11th March 1915 Matthew Whitehill, carrier, 11 Montgomery Street, East Kilbride, *pursuer*, brought an action against the Corporation of the City of Glasgow, *defenders*, for damages in respect of personal injuries sustained by himself, the death of his horse, and damage done to his lorry and to goods conveyed thereon, through being struck by a tramway car belonging to the defenders.

On 18th May an issue for the trial of the cause was approved by the Lord Ordinary (Hunter), and on 11th June the action was remitted to the First Division for trial at the ensuing vacation sittings. On 26th June, in Single Bills, the First Division granted a diligence for the recovery of documents, including, *inter alia*, "all reports, memoranda, or written communications made at or about the time of the accident to the defenders or anyone on their behalf by any inspector, car driver, car conductor, pointsman, or other employee of the defenders present at the time of the accident relative to the matters mentioned on record." When the diligence was executed, on 7th July, the agent for the Corporation stated that he had a report by the driver and conductor of the car involved in the accident, and that he was willing to produce it provided it was sealed up to await the trial on the grounds that it was confidential in character, that it contained what was practically a precognition of the reporters, and that it contained the names and addresses of witnesses for the defenders. The Commissioner held, on the authority of *Macphee* v. *Glasgow Corporation* (*supra*, p. 772), that the report must be produced, and refused to seal it up. The defenders' agent, because of this ruling, declined to produce the report.

After the report of the Commissioner was lodged, the pursuer presented a note to the Court craving that the defenders should be ordained to lodge the report in process so that it might be available to the pursuer. On 13th July the Court ordained the defenders to produce the report by the driver and conductor in a sealed packet within twenty-four hours. The report was so produced. The report was written on a form supplied by the defenders to their servants, and was headed "For the use of the Corporation solicitors to enable them to defend should litigation ensue."

The defenders argued—The report was written to instruct the Corporation solicitors in defending a possible action. Though not obtained *post litem motam*, the report was obviously for the purposes of litigation. It was therefore confidential and should not be produced. It did not fall within the class of documents allowed to be recovered in *Tannett, Walker, & Company* v. *Hannay & Sons*, July 18, 1873, 11 Macph. 931, 10 S.L.R. 642, viz., letters by an agent to his principal, nor the class allowed in *Scott and Others* v. *Portsoy Harbour Company*, 1900, 8 S.L.T. 38, which excluded all reports made in view of a contemplated action. The report contained a list of witnesses for the use of the solicitors. This list was confidential—*Henderson* v. *Patrick Thomson, Limited*, 1911 S.C. 246, *per* Lord President (Dunedin) at p. 249, 48 S.L.R. 200, at p. 203. *Finlay* v. *Glasgow Corporation* (*supra*, p. 446); and *Macphee* v. *Glasgow Corporation* (*supra*, p. 772), were in conflict with the prior decisions and should not be followed.

The pursuer argued — A report made at the time of an occurrence before a course of action was determined on was very different from one made afterwards for the purposes of a litigation which had been resolved on. The argument that the report in question was made in contemplation of litigation was unsound, and would abolish entirely the rule which made certain reports recoverable. Such an argument would apply to every report. The heading of the report did not take it out of the ordinary rule. The report should be produced—*Scott and Others* v. *Portsoy Harbour Company, cit. sup.*; *Admiralty* v. *Aberdeen Steam Trawling and Fishing Company, Limited*, 1909 S.C. 335, 46 S.L.R. 254; *Finlay* v. *Glasgow Corporation* (*supra*, p. 446); *Macphee* v. *Glasgow Corporation* (*supra*, p. 772).

At advising—

Lord President—The question raised by the Dean of Faculty at the recent discussion