excellent and salutary rule for the government of such cases. By means of it litigation will be avoided; and I cannot upon that matter agree with the suggestion ingenuously made by Mr Mackay, that its effect will be to foster litigation, for the reason that no parish will readily give an admission. I do not think that is a good argument, or that the result he fears will follow. I do not think it is desirable that a party in the position of the pursuer should make an admission rashly or blindly, but when made, I do not think he can be permitted to withdraw it on the ground that he was in error.

The only variation between the case to which I have referred and the present, to which Mr Mackay was able to point, was merely one of form. In it the admission was acted upon for a longer time. The period was seven years there, and here it is only one. But to make a distinction upon any such ground would be to discard the fixed rule and to make it arbitrary, which would at once deprive it of its utility.

This action is further said to be barred by *mora*. That is a plea the applicability of which I confess I do not see. It was in April 1868 that the inspector of Caputh wrote endeavouring to withdraw the admission he had made. But there was nothing like acquiescence amounting to withdrawal on the part of the inspector of Perth. He was firm from the first, and said that he meant to make Caputh hold to its admission. To say that there was *mora* in the sense of abandonment, while the parties are engaged in a controversial correspondence, appears to me to be out of the question.

It seems to me therefore that there is no reason for distinguishing this case from that of *Beattie* v. *Arbuckle*, and I am quite prepared and very willing to follow its authority.

Lord Deas—I am of opinion that the case of *Beattie* v. *Arbuckle* is clearly applicable to the present case. There an admission of liability was acted upon for some years; here only for one. But that circumstance makes no difference, and an admission is quite satisfactory whether it has been acted upon for a year or more. There was great deliberation before it was made here, and the Parochial Board sanctioned it. I do not say that an admission rashly made by an inspector, and not sanctioned by the Parochial Board, is to be always binding upon a parish. We shall deal with that question when it arises.

There is more to be said in favour of the judgment it is proposed to pronounce than against it in a question of the administration of the Poor Law, even if the Court were not always disinclined to disturb what has once been decided upon reasonable grounds. I think the Sheriff came to a right conclusion.

Lord Mure concurred.

Lord Shand—I agree with your Lordships. When such an admission has been given, as was the case here, the inspector receiving it is fairly entitled to assume that he need take no further trouble in regard to the pauper. Thus in many cases evidence formerly available to him may be lost, and it is not to be forgotten that the evidence is generally to be obtained amongst a changing population; so that, unless an admission is binding, the parish relieved might be seriously prejudiced. And, even if the admission has been given in error, the case is one on which the other party has acted, and where he would suffer if it were not held binding. It is therefore better to have a general rule. I think the decision is a sound one, even if the question were now raised for the first time.

The Court adhered.

Counsel for Pursuer (Respondent)—Balfour—Keir. Agents—Dundas & Wilson, C.S.

Counsel for Defender (Appellant)—Asher—Mackay. Agents—Lindsay, Howe, Tytler, & Co., W.S.

HOUSE OF LORDS.

Friday, March 9.

LOGAN (SPROAT'S FACTOR) *v.* M'LELLAN.

(*Ante*, vol. xii., p. 225.)

Trustee—Liability of Trustee—Negligence.

Circumstances in which *held* that the claim of a creditor against a trust-estate on which he had formerly been a trustee could not be defeated by allegations of negligence and default on his part when acting as trustee in compelling payment from others, alleged to be debtors to the estate.

Sale—Loan.

Circumstances of a transaction *held* to constitute a sale, not a loan.

This was an appeal for C. B. Logan, W.S., judicial factor on the trust-estate of the deceased Thomas Sproat. The circumstances of this case will be found (*ante*, vol. xii., p. 225) in the report of the decision of the Second Division of the Court of Session.

At advising—

Lord Chancellor—My Lords, the circumstances of this case are somewhat peculiar, and considerably involved; but when your Lordships look at them, divested, as they must be, of a great deal of irrelevant matter which has been thrown around them in the condescendence and the other papers in the case, I think your Lordships will have no difficulty in arriving at a just conclusion as to what your decision ought to be.

My Lords, I will remind you that the pursuer in this case, who is the appellant here, is a judicial factor, appointed in the year 1873, over the trust-estate of one Thomas Sproat, a man who died so long ago as January 1859, seventeen years since. The respondent, on the other hand, is the executrix of a person named William Hannay M'Lellan, who was one of three trustees of the testamentary disposition of this Thomas Sproat, and he continued one of those three trustees for a period of about three years from 1859, the time of the death of the truster, up to 1862, when he resigned the trust. This Thomas Sproat had in his lifetime become the acceptor of a bill of exchange, which was dated the 19th April 1858. It was a bill at twelve months for £1582, 12s. 8d. It

was drawn by William Hannay M'Lellan, and, as I have said, was accepted by Thomas Sproat, the truster. The bill had not matured when Thomas Sproat died; but it matured afterwards, and when matured it was not paid out of the estate of Thomas Sproat. It was held over for some time by the bank, in whose hands it was, and ultimately it was paid, either in whole or in considerable part, by the drawer M'Lellan, who of course was liable in the second degree. Thereupon M'Lellan commenced an action against the estate of Thomas Sproat to be reimbursed the amount which he had paid in respect of the bill.

Now, my Lords, there was no controversy, and there could be no controversy, that M'Lellan had no personal interest in this bill. The bill was the debt of Thomas Sproat, and he, as between himself and M'Lellan, was the person who ought to have paid or provided the money; and, accordingly, looking merely to what I have stated, the claim of M'Lellan to be reimbursed out of the truster's estate the amount he has paid is a claim which cannot for a moment be disputed, and unless it is lost by some default on his part or some counter claim asserted against it, the sum must be recovered out of the estate of Thomas Sproat and paid to the estate of M'Lellan. But thereupon, in the present action, which is brought, as I have said, by the judicial factor representing the estate of Thomas Sproat against the estate of M'Lellan, three grounds are alleged to show that M'Lellan's estate ought not to be allowed to recover the sum of money. In saying "alleged," I mean alleged either upon the record or at the bar. I shall afterwards distinguish between what is alleged upon the record and what is not.

Now, these are the three grounds—In the first place, it is said that this bill was accepted by Thomas Sproat to raise a sum of money in order to pay the debts of his brother Alexander Sproat. This Alexander Sproat was himself a trustee subsequently of the trust-estate of Thomas, and was entitled to a third of the residue of that estate. It is said that the circumstances under which this money was raised to pay the debts of Alexander Sproat were such as to constitute Alexander a debtor of Thomas for the amount; it is said that M'Lellan knew all this, and that he ought after the death of Thomas to have taken steps to recover against Alexander the same amount as that for which the bill was given; it is said that he did not take those steps, and that Alexander having subsequently become, and being now, a sequestrated insolvent, the money has been lost, and that M'Lellan ought to be judged as if the money had been lost by his default—that he should be looked upon as a person who really had or might have had the money in his hands, and that he ought not now to be allowed to recover against the estate of Thomas Sproat money which, if he had done his duty, he would have had in his hands wherewith to pay his own debt.

Then, my Lords, the second ground which is alleged is this—Supposing (it is said) that Alexander Sproat was not a debtor of Thomas, still this bill of exchange was given under an arrangement by which Thomas Sproat bought the stock upon a farm which was held by Alexander; that, having bought the stock, he left Alexander in possession of it as the manager of the farm; that this state of things continued during the lifetime of Thomas for ten months and upwards, and continued after the death of Thomas; that the stock was sold partly during the life of Thomas and partly afterwards, and the money for what was sold was received by Alexander; and it is said that M'Lellan ought after the death of Thomas to have recovered as the trustee of Thomas so much of the stock as remained in specie, and ought to have insisted upon Alexander's paying over, and to have taken action to compel Alexander Sproat to pay over, so much as he had received for the stock which had been sold, and that, here again, not having done this, he ought to be taken as having made default in recovering so much as in this way he might have recovered, and ought not to be allowed himself to assert an independent claim upon this bill of exchange against the estate of Thomas.

Thirdly, my Lords, it is alleged that Alexander Sproat had a third of the residue of the estate of Thomas; that in substance the bulk of that estate consisted of land in Australia; and it is averred at the bar, and there is some evidence given upon the subject, that this Australian property was sold, and that in the result Alexander Sproat was allowed to take at least his own share of the residue out of the proceeds by purchasing the land itself, leaving the claim on this bill of exchange unsettled, and that this was done with the assent of M'Lellan, and that therefore M'Lellan ought now to be looked upon as a trustee who allowed a person beneficially entitled to a share of the residue to take that share of the residue, leaving a debt which he owed to the estate undischarged.

Now, my Lords, of these three grounds I will at once dispose of the third, which is the ground connected with the disposition of the residue and the property in Australia. My Lords, of this ground I must say that I find no reference whatever to it in the conclusion of the summons, and I find no intelligible reference to it in the condescendence. There is indeed a statement in the 16th article of the condescendence (and that is the only passage which even approaches the subject) that "M'Lellan, in breach of his duty as one of, and as agent for, the trustees of the said Thomas Sproat, aided and abetted the said Alexander Sproat in proceeding to Australia and unwarrantably intromitting with the Australian lands of the truster, which formed the bulk of his estate;" but there it stops. What was unlawful is not mentioned; what was his intromission is not described; that he ever received anything on account of the residue, much less that he received on account of the residue his whole share or so much as would have satisfied any debt due from him, or that he ought to have accounted for a debt out of what he received on account of the residue, is not asserted. None of these things are averred in this condescendence. If that which is alleged at the bar and that which is partly described in the evidence, had been asserted upon the condescendence, there might have been something to be said which would have been an adequate defence to the allegation now made at the bar. Of that your Lordships cannot judge. All that I think your Lordships can do is to say that there is now no case upon this score brought before your Lordships. If there is any such case which can be alleged, or ought to be alleged, nothing that is done in the present proceeding will interfere with it. This proceeding is a blank as to any case of that kind; and having said this much

concerning this suggested head of action, I pass to the other two heads which I mentioned first.

Now, my Lords, turning to the first and second grounds upon which relief is asserted, the first observation that I have to make to your Lordships upon them is this—those are two cases which cannot stand together; the one may be maintained or the other may be maintained, but they cannot be both maintained. Alexander Sproat may have been a debtor to his brother Thomas Sproat, or he may be a person who sold the stock of the farm to his brother, and was continued by his brother in the farm as a manager, but he cannot both have been a debtor for the £1500 odd and also the vendor of the stock for that amount of money.

And yet, my Lords, when I turn to the interlocutor of the Lord Ordinary, which your Lordships, as I understand it, are asked to revive, I find that that interlocutor not only does not take notice of the impossibility of these two cases standing together, but does make these two cases stand together side by side, for I find that the interlocutor proceeds in this way — "Finds that it was agreed to between 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 payment 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"—an allegation that there subsisted between the brothers the relation of debtor and creditor. And lower down — "Finds that at the death of Thomas Sproat on the 30th January 1859, in respect of the agreement between him and his said brother" (that is, the agreement before described) "and of the deeds and proceedings abovementioned, 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." My Lords, it is quite impossible that that can have been the case; it is quite impossible that at the death of Thomas the estate of Thomas could be both the creditor of Alexander, entitled to payment of the debt, and also entitled to take as purchaser out of the hand of Alexander the property which in that view of the case it asserts was the property of Thomas as the purchaser.

Well, my Lords, looking therefore, as I think your Lordships must, at these two grounds as separate, I proceed to consider the first of the two grounds. It appears to me that this first ground would be clearly a ground and a sufficient ground of relief if the facts were such as are alleged in asserting that ground. But your Lordships will observe that the whole foundation of that first ground of relief is that there was a specific debt due from Alexander to Thomas. If there was that debt, and if it was the duty, as it would have been the duty, of the trustee of Thomas to have recovered the debt, and if the debt was not recovered in consequence of the negligence of the trustee, and if the debtor afterwards became insolvent, so that the debt no longer could be recovered, then indeed, according to principles of law which prevailed both in England and in Scotland, the trustee might be looked upon as one who had not done, or ought to be taken not to have done, that which he ought to have done—to have had in his hand the money which he might have got into his hand—and might therefore be restrained from paying himself out of any other part of the trust-estate that money which he ought to have had in his own hand adequate to pay his own debt.

But, my Lords, it appears to me that that which is the foundation of this case for relief entirely fails. In my opinion the relation constituted between Thomas and Alexander was not that of creditor and debtor. I do not go through all the documents which have been so lately before your Lordships' view, but I will remind your Lordships of some of the facts of the case. In the first place, the true view of the relation between the parties fortunately does not here depend upon any parole evidence. So far as I can observe, at the time when the transaction took place Thomas Sproat was in England and Alexander was in Scotland. The transaction was arranged by letters and not by word of mouth, and it is in those letters and in subsequent and consequent documents that your Lordships must find the real effect of the transaction.

Now, at this time Alexander Sproat was in insolvent circumstances; he could not pay his debts; he was, as he says himself, absolutely without money; his personal liability as a debtor was perfectly valueless. On the other hand, Thomas, his brother, was a man of money; he had made that which for a person in his position in life was a considerable fortune, in Australia, and he appears to have been willing to assist his brother, who was a farmer in somewhat needy circumstances in Scotland. The arrangement which was made was not that Thomas Sproat was to advance a sum sufficient to pay the debts of Alexander (if that had been the arrangement there might have arisen indeed an inference that a sum measured by that which was necessary to pay the debts was to be advanced as a loan), but that he was to provide a sum which was to be exactly the value, and neither more nor less than the value, of the stock upon the farm—an arrangement raising, on the other hand, the inference that he was to take as a purchaser that for which he was to provide the exact value. And then the arrangement was that this sum, measured and ascertained by the exact value of the stock upon the farm, was to be divided among the creditors of Alexander, and that they were to be paid rateably as much as that sum would be adequate to pay. But further, inasmuch as, as I said, the brother Alexander was absolutely penniless apart from his farm, the object was that he should not be turned adrift upon the world, but that he and his family should be continued in the farm where he had lived, and for that purpose the suggestion was that the stock was to remain upon the farm, and that Alexander was to be there in possession of the stock as the manager on behalf of his brother.

In truth, my Lords, could any other arrangement have been made which would have attained

the object? If it had been intended that the stock should, on the one hand, be only held by Thomas as security—the property in it remaining in Alexander—there would have been the obvious danger of its being said on behalf of the creditors that there had been no such change of possession as would defeat their rights to that of which Alexander continued in possession, and after having been paid their 15s. in the pound they might have contended that they should also be allowed to take possession of that which was left in the possession of Alexander. On the other hand, if at that stage Thomas had made over the stock as a gift to his brother Alexander, there would of course at once be a subjecting of that stock to the right of every creditor of Alexander, who might at once have asserted his diligence against the stock. The object therefore, as I read it, was that Thomas should become, not only in form but in truth and in substance, the owner of the stock upon the farm, but that the farm should continue to be the habitation of Alexander, who should live in it and have a certain amount of control over the stock as the manager for his brother.

My Lords, I may further remind your Lordships that the written documents upon the subject are perfectly clear and distinct. There is not a word in writing at the time of this transaction which points to anything but a purchase out and out. There is no collateral security of any kind whatever taken from Alexander making him a debtor; and yet the transaction was arranged in the most business-like manner with the aid of lawyers. It appears to me to be quite incredible that if it was intended that Alexander should be made a debtor by the arrangement there would not have been some collateral writing evidencing that position of debtor as against Alexander.

My Lords, I have spoken of the written evidence at the time of the transaction, but I must not forget to remind your Lordships that there are writings at a much later period appealed to which are said to bear the other way. I refer to two letters written by M'Lellan, who himself was the lawyer who had carried into effect this transaction, written by him after the death of Thomas, and when he had become a trustee of Thomas Sproat's estate. The first of these letters is dated the 18th of June 1859. It is written to Alexander Sproat, and in it M'Lellan says—"On looking into these papers" (that is, the papers connected with the arrangement to which I have referred) "it seems clear that your brother's executors are the proprietors of the stock, crop, &c., at Brighouse, and that they must rank the £1510, 12s. 6d., with interest from 24th April 1858, as a debt against you, in lieu of claiming the effects at Brighouse." My Lords, it is said that here is a proof under the hand of M'Lellan that Alexander was a debtor of Thomas—I read it as asserting exactly the opposite—I read it as asserting that a view of the papers had led M'Lellan to consider—to be certain—to think it clear—that Thomas Sproat's executors were the proprietors of the stock upon the farm; and upon the papers they were undoubtedly, in my opinion, the proprietors of the stock upon the farm. But then I understand M'Lellan to say that it would be inconvenient, possibly in consequence of some part of the stock having been sold, or for what other reason I may afterwards consider, but for some reason it might be inconvenient for them to claim the stock; and if they did not claim the stock there was another course open to them, which he suggests, namely, to rank as creditors for the £1500 in lieu of claiming of stock. But that is a conclusion of law by M'Lellan, and a conclusion which appears to me to be utterly unfounded. It is a suggestion made by him to Alexander Sproat as to what the executors might do; it is a suggestion which appears to me to be unwarranted in point of law, and in point of fact it is a suggestion which could not even ripen into a right unless assented to by the person to whom it was addressed.

Again, in a letter written shortly afterwards by M'Lellan to a son of Sproat, he says—"I gave your father to understand that, as it was in my knowledge that he had got £1500 from your uncle for the purchase of his stock, furniture, and other effects at Brighouse, this sum must be stated in the general inventory as a debt owing by your father to your uncle, with interest since the period of advance. It is unfortunate that this advance was not made a gift of to your father; but our duty is clear, and the debt must be stated." Here, again, is a statement, not of what M'Lellan considers to have been the arrangement between the parties, but of what he considers to be now the duty of the trustees. There was, he says, a purchase out and out of the stock upon the farm, but that which (he seems to imply) he had expected would have passed into a gift was not actually made a gift, and therefore he says this—not that they must claim the stock upon the farm, which would be the natural and proper legal conclusion, but that they must set up a debt as against Alexander Sproat.

My Lords, I pass by those letters with these observations; they do not appear in any way to have been assented to by Alexander Sproat, and they cannot alter a transaction which had been concluded months or years before. That transaction must be judged of by the documents upon which it was itself founded.

My Lords, I therefore come to the conclusion upon the first head of the case, that there was no debt at the death of Thomas which could have been asserted as against Alexander, and that therefore that head of relief in the action entirely fails.

Now, my Lords, I turn to the remaining case, which I call the second head of relief. If the first head of relief had succeeded, it would have been a definite and complete answer to any claim by M'Lellan for repayment of the sum paid by him upon this bill of exchange, because there would have been against that to be set what we call a *devastavit*, or a default to exactly the same amount by M'Lellan. But I must point out to your Lordships, with regard to the second head of relief, what, even if it could be maintained, would be the utmost amount of remedy or of relief that the pursuer could receive. My Lords, the very utmost upon this second head of relief would be this, the pursuer might say—Let us look at Thomas Sproat as the purchaser of the stock upon the farm; the whole of that stock had not disappeared when he died; it ought therefore to be ascertained how much of that stock remained upon the farm at the death of Thomas, and it ought to be ascertained how much was sold before the death of Thomas, and the value of what remained in specie

should be taken, and the value of what was sold should be taken. Further than that, there must be an account against Alexander or in favour of Alexander, as the case may be, as the manager of the farm, for he was continued as manager—he had payments to make—there was the rent of the farm to be paid—there were outgoings—there was labour—there was the sustenance of the cattle so far as the farm did not provide for that—there were the various expenses which go to make up the outlay upon a farm of this kind; the whole of that account must be taken, and upon the result of that account it must be found what was the sum, if there was any sum, which could have been claimed or asserted as due from Alexander Sproat to the estate of Thomas. And then, if there is found to be a sum due from Alexander to the estate of Thomas, it must be held that M'Lellan was answerable for not having had that account taken and for not recovering that sum, and, so far as money has been lost, it must go against the claim, not necessarily to obliterate the claim which he now makes in respect of the bill of exchange which he has been called upon to pay.

My Lords, looking upon that as the only relief which upon this head of the case could be granted, if relief were to be granted at all, I have first to observe to your Lordships that the Lord Ordinary in his interlocutor has taken no steps whatever to ascertain the extent of relief which upon this head ought to be granted. He has assumed that upon an account such as I have described there would have been found to be such a sum coming from Alexander as ought to prevent M'Lellan's estate recovering anything in respect of the payment of the bill for £1500 odd.

But, my Lords, I have to consider whether your Lordships ought to be advised that there is now enough to be the foundation of an account against Alexander for the purpose of countervailing the claim made by the estate of M'Lellan. In the first place, I remind your Lordships again that you are here asked to give relief against that which is a clear right. The right of the estate of M'Lellan is clear to be paid the sum which he paid on account of the bill of exchange. Now, what is there to be set against that right upon the subject of this account which possibly might be taken against Alexander? I have, first of all, to remind your Lordships of the lapse of time. You have a claim here put forward after 19 years to make an investigation into an account which I should say at this distance of time would be an account the taking of which would be absolutely impossible. In the next place, your Lordships have to judge whether such an account should be taken in the absence of those who are the very persons who could give you the information which your Lordships would naturally desire as to the true character of the dealings between these brothers. M'Lellan, who knew most about it, is dead; he died in the year 1868. Mrs Thomson, their sister, who was evidently a woman accustomed to business—accustomed to the management of her property—with whom, as I understand it, before his death the brother Thomas lived, upon the spot in Kirkcudbright where the farm is situated, is also dead; she died in 1863. The pursuer in the action tells your Lordships very candidly that he is a perfect stranger to the whole subject. He was appointed judicial factor in the year 1873, but about the subject-matter as to which he sues he knows nothing whatever. One naturally asks, what is the explanation given of the delay which has taken place? If Alexander ought to have been called to account, or if M'Lellan ought to have been called to account, in respect of his intromissions, what is the reason for the delay during all these years? It may very well be that a reason could be given, but no reason whatever is given in the proceedings now before your Lordships.

Well, now, my Lords, in this state of obscurity, with all these difficulties in the way, let me remind your Lordships of what we know actually did happen with regard to the dealings between these brothers. I have pointed out the position of Alexander—he was left in the management of this farm; Thomas Sproat lived for fully ten months after the advance of the money was made; and, after Alexander Sproat commenced the management, Thomas Sproat, as I understand it, came and lived during the greater part, or at all events some considerable part, of that time immediately beside him, at Mrs Thomson's, who lived near to the farm of Brighouse, and therefore Thomas Sproat must have seen everything that was going on. He knew as well as a man could know that his brother had no means of subsistence whatever except by living upon the farm and converting into money the stock or produce of the farm—he knew that included in the property he had bought there was a considerable amount (I observe something about £300 worth) of crop which had to be sold off, and there were the lambs and the cattle ready for sale which in the natural course of business would be sold off in the course of the year, and he knew therefore that his brother was selling, and perhaps also that he was buying, and that he was living on the farm and using the produce for the livelihood of himself and his family; and he knew that he was going to expense in managing the farm and paying the rent. It does not appear that the brother Thomas provided any money for that purpose, and therefore he must have known that his brother Alexander was using the money of the farm to provide for the outgoings; but he does not appear during all these months to have taken any step to interfere in the management or to ask for an account of the management.

Now, my Lords, I do not for a moment suggest, and I do not myself believe, that Thomas Sproat did anything in his lifetime which turned the property which he had bought from Alexander into a gift to Alexander. I do not believe that he had determined to do anything of the kind. I believe that during his lifetime he was holding his rights, whatever they were, in his own hand, and that, if he had been driven to it, he might have asserted those rights when he pleased; but at the same time he was allowing his brother a kind of latitude with regard to this property which was quite inconsistent with the view which would treat the brother as conducting a business out of which Thomas expected to receive profit, and for which he intended to exact a particular or accurate account.

My Lords, there are two letters which, in the absence of any more definite evidence throw, I think, considerable light upon this part of the history. They would not amount to evidence if your Lordships had now to try in strictness the right of Thomas as against Alexander; but, for

the question which, as I will attempt to point out to your Lordships we have now to answer, these letters appear to me to have a really important bearing on the case. One of them is the letter which I have already read, and which I will not repeat, in which M'Lellan, writing to Alexander Sproat's son, says that it is a great pity that his uncle did not actually make the gift in his lifetime to his father. That letter, to my mind, shews very strongly that there had been a kind of understanding, or that it was known to M'Lellan as a man of business that the relations between the brothers were such as to make it extremely probable that this purchase was really at some time to assume the form of a gift to Alexander. The other is a letter which I understand is put in evidence by the pursuer himself, and written by the pursuer's law-agent in the year 1869 to the son of Mr M'Lellan. He says, writing on the 4th of June 1869—"Mr Alexander Sproat informs me that he called upon you some time ago with reference to the bill for £1582 odd, granted by the late Thomas Sproat to your father, and the transaction out of which that arose; since then, Miss Kerr" (who is one of the beneficiaries) "has brought a summons of count, reckoning, and payment against her aunt Mrs Thomson's trustees, in which she alleges that this is a debt due by Alexander Sproat to his brother's estate." And then further on he says—"Your father" (that is, M'Lellan, the trustee) "frequently told Alexander Sproat that Thomas had no intention of making any claim in respect of this advance (which was intended as an equivalent to him for the conveyance which he subsequently granted to Mrs Thomson of Tongue Croft), and no obligation seems to have been come under by Alexander Sproat in regard to it, neither has your father entered it in the inventory of Thomas' estate, and has uniformly treated it as a debt due by Thomas (which it was), but without any claim of relief therefor against Alexander; and as he must have been intimately acquainted with the whole circumstances, it is very improbable that Miss Kerr's contention is correct."

Now, my Lords, along with that I put the evidence of Alexander Sproat. I do not attach, I am bound to say, upon any point which is in serious controversy, very great weight to the evidence of Alexander, but still it is important, called as he is here, to see what he says upon the subject. He tells you this—I will only read a few sentences to illustrate what I mean:—"After the agreement my brother never interfered with my possession. He left me in undisturbed possession and management of the farm. I had full control, and I managed everything just as I had done before; I sold the stock and crop at my discretion. That was my position at my brother's death. (Q) Did you expect him to interfere with you in the management of the farm if he had lived?—(A) No. (Q) Did he ever say anything to indicate to you that he proposed to disturb you at all?—(A) No; the reverse. (Q) Did you understand that he wished you to continue in possession of the farm just as before?—(A) Yes; certainly. (Q) Was that the object of the arrangement he had made with your trustee?—(A) Yes, I think so. (Q) Did he ever ask any acknowledgment from you that he held the stock for him?—(A) No. (Q) Did Mr M'Lellan know that these were your brother's wishes, do you think?—(A) I was led to believe so; I considered so." Then, again, he says as to Tongue Croft—"He conveyed it to my sister Mrs Thomson sometime before he made his settlement. I think I knew that at the time. I considered that the money which he had given me to assist me was an equivalent for what he had done to Mrs Thomson, to make us both alike. I never understood that I would have to surrender my stock in the event of my brother's death." Further on he says—"My brother was in delicate health some time before his death. He was at Malvern for some time. His nephew died on the farm in July or August 1858, and he then came down and lived with his sister; after that they both went to Moffat, where they resided till his death. Moffat is about fifty miles from my farm. My brother knew I was selling off the crop and stock, and dealing with my farm as I thought fit. After the advance he never spoke to me on the subject of it so far as I can recollect." Again, he says—"I knew that the advance to me was not in the inventory, and I thought that quite right, because I was led to believe that it was a sum my brother was going to give me." And then lower down—"After my brother's death I think he" (that is M'Lellan) "once said it was a pity my brother had not made a settlement or statement to the effect that he gave the £1500 as a gift, making me equal with Mrs Thomson. From my conversations with Mr M'Lellan I was led to believe that he understood that my brother meant to do that."

Now, my Lords, in the paucity of evidence which your Lordships have, and must have, in this case, it does appear to me, that taking these things together—taking the expression in the letter of M'Lellan—taking what Mr Scott says was his impression as examining into these affairs—taking what is said in the passages I have read by Alexander Sproat—it must be a fair conclusion, not that there is in any of these things that which would establish upon an issue alleging that Thomas Sproat had made or had intended to make a gift of the stock to Alexander, that he had so made a gift of the stock, but that there is that which, upon an issue whether after the death of Thomas Sproat the trustees of his estate, acting in good faith in the management of his estate, might not have well conceived that an accounting with Alexander for his intromissions as regards the stock of this farm was a proceeding which it was not incumbent upon them to take, and which, if taken, would not lead to any result which Thomas Sproat would have desired to be arrived at—that there is that which would tend to show that the trustees might well have conceived that this was not incumbent upon them. And, my Lords, it appears to me that the question for us here to determine is this, Are we to assume after this lapse of time, and in the midst of great and admitted obscurity, that the trustee of Thomas Sproat was so manifestly wrong in not claiming as against Alexander the stock, if any, remaining in specie, and claiming an account against him as manager (an account which might have turned out either for or against Alexander), that we should now without more evidence tie up the hands of the executrix of M'Lellan from recovering the payment of a sum which is actually and really due to her. My Lords, I am not able to arrive at the conclusion that we ought so to do. The only form of relief, I repeat, which could be obtained, in my

opinion, in this suit would be a relief by way of an inquiry and an accounting as to what the state of things with regard to the farm nineteen years ago really was. It seems to me that there is not enough here to lead us to conclude against M'Lellan, the trustee of Thomas, that he was so manifestly wrong in not insisting upon such an account during the years that he was trustee of the estate, that we ought to prevent his representative recovering a debt which is really due.

My Lords, those are the grounds which have led me to come to the conclusion that the opinion entertained by the majority of the Judges in the Court of Session is correct; and having come to that conclusion, I have to submit to your Lordships that the interlocutors appealed from ought to be affirmed, and the appeal dismissed with costs.

Lord Hatherley—My Lords, in this case the only difficulty which has occurred to me during the course of the argument has been that difficulty which is inherent in the nature of the record, and in the endeavour which is necessary on account of its intricacy to understand what is the exact point of view in which the present appellants wish to place their case. I think when you have ascertained, as far as it is possible under these circumstances, what is the exact position they wish to occupy, the solution of the point of difference does not in itself admit of much doubt or discussion.

Now Mr Thomas Sproat, the truster, in the trust instrument which he has executed, and which is set forth in full in this case, divided his property, which was considerable, in this manner—After giving certain legacies, and, in particular, one of considerable amount, £3000, to a family of the name of Kerr, he distributed the residue of his property among his relatives in the following fashion:—He gave one-third to Alexander Sproat, his brother, one-third for the benefit of Mrs Thomson, his sister, and one-third for the benefit of the children of a deceased brother Dr John Sproat. He appointed his brother Alexander and Mr M'Lellan two out of four of his trustees under this trust instrument. Mr M'Lellan was the gentleman who had previously to this, in the year 1858, been instrumental in arranging between the two brothers Alexander and Thomas a disposition of the property on a farm called Brighouse, occupied by Alexander, for the purposes which I will presently mention—He had taken from Thomas in his lifetime a bill for £1500 odd, for moneys which, nominally at all events, were advanced by him, and, as far as appears by the pleadings, actually advanced by him, though possibly obtained from the Bank of Scotland. As to the existence of that as a good debt against the estate of Thomas Sproat at his death, there can be no doubt; neither has it been questioned that that debt still remains unsatisfied.

The question between the parties arises in this way—Thomas Sproat gave this bill, as is expressed on the face of it, for value received in the shape of property on the farm called Brighouse, held by his brother Alexander, and one of the main questions before one can arrive at any clear conclusion as to what the rights of the respective parties are is this—Was that transaction in which Thomas gave this bill, nominally at all events on the face of it, in consideration of the plenishing of the farm of Brighouse? Was it a purchase out and out by him of this plenishing, or was it an advance to Alexander to enable him to come to a settlement with his creditors, which advance was to be repaid by Alexander, and as a security for that repayment the plenishing was to be made over to his brother Thomas, the giver of the bill? The case is certainly not put very clearly upon the record, but one point is raised there undoubtedly plainly enough as far as statement goes. It is asserted that in this transaction, which one must look at a little more closely, the true intent and meaning of all parties was that in respect of this bill so given Alexander should be the real debtor, that his brother Thomas should merely find and advance the money to him, and that he should become a debtor to his brother Thomas, and that the plenishing should be handed over to Thomas, the author of the bill, merely as a security for the repayment to him of the sum that he had so advanced.

Now, my Lords, it is very important, as it appears to me, in order to understand the exact nature of the case, to see what were the transactions which immediately preceded and succeeded the giving of this bill; and in the word "transactions" I include, on the one hand, the previous letters by way of treaty (if I may use the expression) between the two brothers, and, on the other hand, the character of the instruments themselves which were executed in order to give effect to their intention with regard to this disposition of the plenishing. Well, my Lords, I confess it appears to me to be beyond all doubt, when you look at the nature of the transaction, and at the letters which were written beforehand, and at the instruments themselves, which were drawn with respect to this disposition of the property, the trust-deed to M'Lellan, which was executed by Alexander in the manner I shall have to mention, and the agreement for sale from M'Lellan to Thomas Sproat, that the whole transaction was this—Alexander, finding himself in great difficulty (the letters show almost absolute insolvency), and being most loth to lose his position and status as a farmer in that district, was anxious, as privately as he could, to settle with his creditors and, as he expresses it in the first of his letters (which I shall have to refer to presently), to give up the foolish idea of farming without capital. Therefore having this desire to escape from the position he had placed himself in, and to do it in as quiet a mode as possible, he, by the recommendation of his creditors—M'Lellan being one and M'Kenzie another (both of them I believe connected with the Bank of Scotland at Kirkcudbright)—resolves to make over to his brother the whole of the stock, to put his brother in the position of purchaser of the whole plenishing of the farm, and himself to take the position of manager of that farm under his brother, and by the proceeds of the value of that stock to pay off all the creditors, getting them to submit to a composition on their debts of, I think, 15s. in the £1. Accordingly, up to the point of the transaction itself, stopping for a moment there, the arrangement was that a sale should be made to the brother Thomas, and that Thomas should employ his brother Alexander thenceforth in the management and

conduct of his farm, not without a hope apparently existing on the part of Alexander that his brother might be inclined ultimately to make a gift to him of the property which he should so buy, and so to reinstate him altogether in his former position as a farmer carrying on a farm upon this property.

That, my Lords, is the view I take of the transaction up to the time of the sale, and let me see for a moment whether the documents we have before us do not fully justify that view. They begin with the correspondence. The first is a letter of Alexander Sproat, dated "Brighouse, February 5th 1858." After referring to other matters he there says—"I have long thought of a plan which I was anxious to effect last year, viz., that my whole effects should be valued and offered to you and made over absolutely" (no talk of a mortgage there); "you to name a manager; the rent, wages, rates, and taxes to be paid; and the balance divided among my creditors. I went into town yesterday and explained everything to Mr M'Lellan, and asked him if this plan would satisfy the bank. He signified that it would, and the best for my interest. He also mentioned other plans" (which I need not enter into, because these other plans were not executed), "namely, a trust-deed executed by me for the sale of my effects, and division; (2) myself to sell off everything under the guidance of a committee of creditors, and divide the proceeds; (3) a sequestration and bankruptcy,"—then he asks his brother to consider this. He gets a letter in answer to this, but we have not the answer before us. Then he writes another letter, dated the 18th of February, soon afterwards, in which he refers to his brother's answer. He says—"Dear Brother,—I received yours on the 13th. I am sorry I can't go to Malvern next week," and so on; and,—"As you do not seem rightly to comprehend the plan I suggested, namely, conveying all over to you, to be sure I went into town yesterday and spoke to M'Lellan again and also John M'Kenzie, and they both agreed that this plan was the best for me, provided I could get friends to come forward and agree to take my effects, and also explained that the creditors would agree to the valuation before hand and take the division after deducting the preferable debts."

Then we come next to a letter written by Mr M'Kenzie to Thomas Sproat. M'Kenzie is the other friend that I referred to. M'Lellan was the one and M'Kenzie the other. He says—"Your brother called on me to-day in reference to the subject of his late communication to you; for the purpose of saving time, I take the liberty of writing direct to you. The arrangement proposed was this—That Brighouse should authorise two of his principal creditors as a committee to communicate with the larger creditors, few in number, to agree to the committee disposing of the effects to any friend of your brother willing to purchase at the valuation of men mutually chosen, with power to name an oversman, or, if the sellers and purchasers prefer, at the valuation of one good man; that Brighouse should continue in the farm to manage it for behoof of the purchaser, keeping books of his receipts and payments; that, if necessary for the security of the purchaser, he should assign the lease to the purchaser, of course with the landlord's consent." Then, a little lower —"To put the purchaser beyond the risk of any loss, he should get an assignation to the lease of the farm, for the rule of law is that 'possession is the badge of property,' and hence it is all but impossible without a change of possession to put effects on a farm beyond the power of the creditors of the tenant." I read that as saying, There may be a want of satisfaction in the minds of your creditors unless they see the possession actually changed, and then there will be a risk of the sale itself becoming ineffectual for any purpose that you may require as a means by a sale of it as your own property of recouping yourself, and therefore it is thought desirable that, as well as taking the chattels, you should also take the lease itself, and give every evidence of a public transference of the property. But, my Lords, every word there speaks of purchase; there is not a word of mortgage or anything of the kind.

My Lords, what took place afterwards was this —A single valuator was agreed upon on the part of the creditors, by M'Lellan and by M'Kenzie and Alexander Sproat, to make a valuation. The creditors came into this plan; they said they would agree to a sale at a valuation to any person who was willing to become a purchaser, and they would be content to accept the purchase-money from the person so possessed; and in order to carry into effect this whole arrangement, the deeds which, after looking at the next letter I shall refer to, were executed.

The next letter which I shall refer to is dated the 2d of March 1858. Mr M'Kenzie again writing to Thomas Sproat says—"Mr M'Lellan expects to get matters carried through very shortly. Brighouse being much averse to publicity, induced Mr M'Lellan to undertake the business alone. Indeed his large creditors are so few in number that there would have been a difficulty in getting any person here to be joined with Mr M'Lellan." Then he goes on—"We agree in thinking that for your safety Brighouse should, with the landlord's consent (he cannot assign without it), assign the lease to you immediately." Then—"Mr M'Lellan has written to Mr Brown, Cassalands, to ascertain if he can undertake the valuation." And then—"We came to the conclusion that it was advisable for the safety of all concerned to divest Brighouse by a short deed of trust"—that is to say, he is to part with the whole property; it is all to be divested from him. We shall now see in what manner, having divested it from him and passed it into a trust-deed, they carried the purpose into effect, of handing over the whole property to Thomas Sproat.

Then, my Lords, Alexander executes a deed of trust-disposition, by which he hands over the whole of this property in question—the chattels on the farm—to M'Lellan, upon trust to sell and divide amongst the creditors. I need not enter into it at any length; it is an agreement in the common form throughout. There is a trust for absolute sale to a purchaser who may choose to advance the money, and then it provides that the money is to be distributed amongst the creditors.

Then comes that which is a very important document in the case, the minute of agreement between M'Lellan and Thomas Sproat, and it begins in these words—"M'Lellan, as trustee foresaid, in virtue of the powers contained in the said deed, has agreed to sell and hereby sells to Thomas

Sproat, and Thomas Sproat has agreed to purchase and hereby purchases," the whole of this property, which was valued at somewhere about £1400 odd. That, with some discount and other items, made up the bill of over £1500, which is the subject-matter of the present inquiry. That bill was accordingly drawn, which I have already mentioned, by which the £1500 was made payable to M'Lellan, the trustee of this instrument, the property being sold to Thomas Sproat. Nothing else appears in writing at that time with reference to the disposition of the property.

Well, now, I apprehend, my Lords, that we can come to but one conclusion upon that, namely, that in everyone of the letters where the proposal is made, the proposal is for an out and out sale; that that sale should be completed, if it can be conveniently done, by obtaining also an assignment of the lease; that when that sale is so completed as between the two Sproats, Alexander proposes that Thomas, his brother, shall put him in to manage the farm. And apparently that seems to have been done and the bill given, and Alexander Sproat left in possession of the farm as the manager appointed by Thomas Sproat.

Now, I cannot find anything afterwards which could make one doubt or hesitate upon this subject, and I should not have supposed that it could possibly have been questioned, except that the Lord Ordinary has come to a different conclusion. He treats this as a mortgage, in which case Alexander Sproat would be the principal debtor in respect of the £1500; he would become a debtor in that respect upon his brother's estate, on account of his brother having advanced it to him, the purpose of lending it to him being for distribution among the creditors. The Lord Ordinary seems to have been very much impressed by two letters of M'Lellan, upon which he comments with some severity. One of them is dated the 18th of June 1859, and the other is dated the 22d of August 1858, some considerable time, be it observed, after this transaction and after the death of Thomas Sproat. The bill itself was at a year's date, and therefore would not mature until about the month of April 1859. In the meantime, Thomas Sproat, who had drawn the bill, and who had thus become the purchaser of the property, had died; he died in January 1859. On the 18th of June 1859 Mr M'Lellan writes a letter to Alexander Sproat, in these words—"I send you my current-account with reference to the trust created in my person in March 1858, now closed so far. This account shows a balance of £22, 10s. 7d. due to me, with interest from the 6th of May last, when it was made up, and I will be happy to receive payment of that balance as soon as convenient. On looking into these papers it seems clear that your brother's executors are the proprietors of the stock, crop, &c., at Brighouse." That, I think, is a view that I should myself take. And then he adds this—"That they must rank the £1510, 12s. 6d., with interest from 24th April 1858, as a debt against you in lieu of claiming the effects at Brighouse."

I certainly cannot quite follow that as a legal conclusion. It seems to me a great mistake, but I do not see that there is anything that can justly be imputed to M'Lellan as showing any dishonesty or improper intention on his part in that statement. He makes an error. It appears to me that the executors could not be both proprietors and creditors. If they had bought the stock, it was one thing—they had the value of their money; if they had lent the money, it was another thing—in that case there might possibly be an equitable mortgage, which might be considered as a means of securing the debt. I think, my Lords, that the first interpretation given to these words is the more correct one, namely, that they were the proprietors of the stock, crop, &c. Then he says —"I mention this to prepare you for the claim, as I have recommended to your son that a general inventory of your brother's personal estate should be immediately given up, so as to receive payment of the £250 draft from Geelong."

The other letter which is referred to is the letter dated the 22d August 1859. It is written by M'Lellan to G. M. Sproat, a son of Alexander Sproat—"Dear Sir—I had a long interview with your father" (that was Alexander Sproat) "last week, when we discussed matters concerning your uncle's trust." And then at the end comes this —"I gave your father to understand that as it was in my knowledge that he had got £1500 from your uncle for the purchase of his stock, furniture, and other effects at Brighouse, this sum must be stated in the general inventory as a debt owing by your father to your uncle, with interest since the period of advance. It is unfortunate that this advance was not made a gift of to your father, but our duty is clear, and the debt must be stated."

That, no doubt, adopts the erroneous conclusion mentioned in the former letter, that they were in some fashion or other both proprietors of the stock and also creditors in respect of the value of that stock, but, as has been observed by my noble and learned friend on the Woolsack, these conclusions of M'Lellan are not conclusions come to after converse with Thomas. It does not appear that there was any intercourse between them from the time of the execution of the deed up to the time of the death of Thomas, and at this time Thomas had been dead for some months. Even during the negotiations, Thomas was not near Kirkcudbright or near Brighouse Farm. During that time he was at Malvern most of the time, and subsequently, I think just before his death, he removed to Moffat. Therefore it is quite plain that M'Lellan is here reasoning upon the documents when he speaks of what was in his knowledge. We have every reason to suppose that we have all the documents now before us which are extant. We have not the letters of Thomas Sproat—that is a misfortune to somebody, but we must not impute it to anybody as a fault. Under these circumstances, I cannot but come to the conclusion that the Lord Ordinary has somewhat severely commented upon these two letters of M'Lellan, which appear to me merely to state inferences which he has drawn from his subsequent memory of the transactions which took place at the time when they actually did take place. Of course the only safe proceeding to take in a case of this kind is to rely upon that which we find proved in evidence antecedent to the transaction, accompanying the transaction, and immediately following the transaction, by which last I mean the giving of the bill which was for the purchase-money of this stock.

That being so, my Lords, what was the position of M'Lellan when he became an executor and became a trustee under the trust-disposition?

He was a creditor for the sum of £1500 upon the bill. The bill was not then due. When he first became executor it had two or three months to run, but it would become due in about two or three months' time. He found Alexander Sproat in possession; he had been in possession from April. Having come into possession in April 1858, Alexander Sproat continued to be in possession up to the death of his brother Thomas in January 1859. Thomas does not seem to have insisted upon his keeping any books. It was proposed in one of the letters that the manager of the estate to be appointed by Thomas should do that, but the matter being between two brothers, Thomas does not seem to have required any books to be kept, and on the face of these documents, and on the face of the whole transaction, it is extremely probable that in course of time that which Alexander says in his evidence would have happened. I place no very great reliance upon anything that Alexander states about the transaction, for reasons which are quite apparent upon the face of the record; still, so far as his evidence about it goes, he states that he was under the impression that his brother, who had lately made a present, as he describes it, to his sister Mrs Thomson of £1500, would be very likely to be kind enough to make a similar present to him in the shape of his stock-in-trade.

At all events, he left him in possession of the stock on the farm, and M'Lellan cannot be answerable as regards the stock in specie for anything that was done by Alexander with reference to that stock, and the disposal of it between the month of April 1858 and the death of Thomas in January 1859, during which time there must have been sales of parts of the stock and crops. I see by the valuation that about £300 was put down for crops and about £650 for cattle and sheep; some of these would probably be the subject of sales. A good deal of the stock and crops which were valued at £1500 may have been disposed of during the lifetime of Thomas—we cannot tell about that—we have no account of that, and no information about it. But of course for any part of that stock in specie which had been parted with before the death of Thomas, M'Lellan could not be answerable.

Assuming this to have been a purchase of the stock, it might perhaps be said—You, M'Lellan, are answerable for any stock that was then left unsold at the time of Thomas' death, and you are answerable for not calling Alexander to account for so much of the stock which had been in his hands as he had sold and disposed of, and for which he might have been made answerable to his brother's estate, unless it be taken to have been a gift from the one brother to the other. But, my Lords, all this we are left to conjecture. The most that could be said now upon this state of the transaction is this. It appears to me clear that it was a purchase and not a debt. There was no debt owing by Alexander at the time of Thomas Sproat's death unless there was a debt arising in the way I have described, namely, in respect of the value of any stock he might have sold. He was also residuary legatee of a third part of his brother's estate, which was something considerable—he states it himself in his evidence. An account which is not produced here was produced to him at the time of his examination, and he says that M'Lellan represented to him then that his share of the residue would be worth in money about £3830; whether that included the Australian property or not does not, I think, appear.

I mention these circumstances to show how entirely we are, and necessarily must be, left in the dark as to this part of the transaction, the record in the present case not assuming the form of a general account of the truster's property, but fastening upon this particular transaction and selecting that as the object of discussion and judicial decision. But while mentioning that, I venture to add, my Lords, that in a matter of this kind, where there is an account to be taken to which a person is liable as trustee under a trust-disposition, which person at the same time occupies the position of a creditor with a clear debt, it is not the course of the Court to allow one single transaction to be fastened upon, and to allow it to be said—True it is, you have here a debt which is undisputed, but there is against that debt to be set off such an amount of money as by your default has been lost to the estate, and we fasten upon this default in regard to a particular asset of the testator's, namely, the stock of the farm in the possession of Alexander, and we say in respect of your negligence as to that stock, —£1500 of value, for which value this bill was given, has been lost to the estate, and therefore we are entitled to debit you with that sum; it does not matter whether you treat it as a matter of set-off or as a matter of incompetency on the part of this executor, who is both creditor and at the same time has a duty to perform as executor, we will set off that item against the bill, and having dealt with that single item, we will leave all other matters to be settled in any further proceeding before the Court.

I take it that if M'Lellan is to be made liable and answerable at all as regards any such delinquencies or deficiencies with reference to the debtor's estate, there ought first to be harged in the condescendence a clear case of default, pointing out wherein the default lies, and also the amount of that default, and there must also be some clear evidence to show that that default has prevented the debt in question being discharged by him who, it is said, ought to discharge it, namely, Alexander. The form of the record here is this—Alexander is a debtor; he is the first person liable if he cannot answer and make good the amount; then, in the second instance, we come upon you, M'Lellan, in respect of your dealings with him and your negligence in not obtaining from him the payment of the debt. In that form accordingly the record was framed, and Alexander not making any objection the decree was passed with regard to him. I think it appears so upon the record. Then they proceed to say—Now, you have allowed Alexander Sproat to waste this property, you have not made him answerable for what he has done, and therefore you, M'Lellan, are not in a position to insist upon your clear and undisputed right as a creditor of Thomas.

My Lords, there are two good reasons against acceding to such a view. The one is, that without taking the whole account you cannot ascertain what Alexander's share of the residue might have been, and you cannot tell whether he has been overpaid or not. If he has not been overpaid there was no harm in allowing the item of stock to go into his share. Until you can tell what the

relative positions of the parties is, you cannot say whether M'Lellan has or has not done wrong in not claiming that particular portion of what we should call the assets or of the property of Thomas, which consisted of the unsold stock, and in not charging Alexander in respect of such portion of that property as he might have sold. We cannot arrive at that unless we see that there has been an over-payment, and that there does not remain sufficient of the residue to provide the shares of Mrs Thomson and the children of Dr John Sproat. There are some statements to that effect, I think, in part of the record, but no account has been asked for leading up to that, nor indeed could any such account in the present state of the record well be devised by the Court. The second reason, my Lords, is that it is not the custom of the Court, nor of any court of justice in any part of the world, in accounts of this nature, to allow a person to fasten upon a single item and to say—There may be a balance due to you upon all the rest of the account exceeding £1500, but you have failed here, and I fasten upon that item and I take that as a charge which I am entitled to make against you *qua* trustee in this trust proceeding, and I say, that whatever might be the result of a general account as against yourself, that should be set off as against this debt of which you are now claiming payment.

Now, my Lords, I think in justice to the memory of M'Lellan I ought to say that I should think it very unjust to fasten upon him, as things stand upon the face of this record, any such default at all, because I am by no means certain that he was not acting with perfect propriety at the time of Thomas' death in allowing Alexander Sproat, who had been left by the truster in possession of this asset of these goods upon the farm, who had been left to manage the farm, and who was at that time in possession of capital for the managing of it which he had not before (that was the great difficulty he was in before, he had not capital enough to farm with, and could not go on without), to remain in possession of the stock. I do not feel competent upon this record at this moment to pronounce that M'Lellan might not be justified under the circumstances of the case, if they were all fully explained, in leaving him in that position in which his brother had left him, and wished to maintain him. Whether or not Thomas meant to give Alexander the property is quite a different question, but he evidently had a wish and a desire to allow him to remain up to January 1859, the date of his own death, in possession of it, and if M'Lellan saw clearly that Alexander's share of the residuary estate far exceeded the amount of this stock, then he might feel justified at the time in waiting to see whether or not, when all matters should be settled between them, this particular asset should not be justly retained by Alexander as a portion of his share, namely, one-third of the residue; in which case all matters would be set right, and for all I know they might have been set right, or they may yet be set right, as amongst themselves in case of any inquiries properly conducted. In deciding this case, and coming to the conclusion I have done upon it, I have purposely abstained from saying one word as to what other remedies there may be against the estate of this gentleman. It appears to me, my Lords, to be perfectly impossible, upon a record framed as this is, that full and complete justice can be done to all the parties interested in the inquiry.

My Lords, there is only one other point that I have left untouched in the case, so far as the argument at the bar succeeded in making clear this very entangled case, and we are very much indebted to the Lord Advocate, and to Mr Robertson, who succeeded him, for bringing out the points as clearly as they have done, looking to the tangled skein which they had to unravel. When we come to the other branch of the case, namely, the attempt to fasten upon M'Lellan the consequences of the intervention of Alexander in the Australian property, the pursuers certainly appear to have taken a most extraordinary course. There is nothing on the record, except the 16th condescendence, which seems to have the slightest bearing upon or to point in any way to this particular case of the Australian intromissions. That condescendence runs thus—"Further, the said W. H. M'Lellan, in breach of his duty as one of, and as agent for, the trustees of the said Thomas Sproat, aided and abetted the said 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 so on. Literally, the only part referring to Australian intromissions is in the five lines that I first read, where it is said that he "aided and abetted the said Alexander Sproat in proceeding to Australia and unwarrantably intromitting with the Australian lands." What could warrant such a charge as that I do not say at a distance of time of some twelve or thirteen years, but at any distance of time, however short, a year or two years? Nobody could dream that under this charge it was to be made out that there was a sum of money agreed to be paid by Alexander, and that instead of his actually paying that purchase-money for the Australian estates (it being, as he says in his evidence, a purchase made by him on behalf of himself and his sister Mrs Thomson, the judicial manager of whose estate is one of the pursuers), the trustees gave, in respect of that purchase so made, a receipt as if they had received the money when the money had not come to hand. As one of the learned Judges truly says, in point of law if a trustee chooses so to commit himself as to give a receipt for moneys which have not come to hand, and allows the person who ought to pay the moneys to retain them in his hands, it may well be taken that he, the trustee, has received them. Upon the fact of the existence of such a receipt unexplained he must be taken to be the person to whom the money has been properly handed over by his co-trustee, or whoever might be the person who had to pay the money. But could anybody dream that all that could possibly be deduced from such a condescendence as I have read? My Lords, it is idle in every way to pursue that portion of the inquiry. It is open to all the objections of its being a single account as to the greater part of the demand, and the still graver defect here of allowing matters to be introduced by way of evidence as to which there could not be any possibility of conjecture on the part

of the defenders with reference to the manner in which they were to meet a charge of the nature of which they would not have the slightest knowledge.

My Lords, there is one other point that I will notice, not as bearing upon the decision of the case, but because it is due to Mr M'Lellan to mention it, and that is, as to the letter he is said to have written giving a false account of the origin of the debt of £1500. This also has been a good deal accentuated by some of the learned Judges in the Court below, but on this point, my Lords, I confess I cannot altogether acquiesce in the view which they took. It is supposed that Mr M'Lellan give a false representation of the origin of the debt of £1500 when he attributed it to an intended purchase on behalf of Mrs Thomson of certain other property, and it is said that this was done for some wilful purpose of blinding those with whom he was dealing in respect to the truster's estate. Now, it does turn out, curiously enough, that in the very months when this correspondence was going on between Alexander and Thomas Sproat and between Mr M'Kenzie and M'Lellan there was a correspondence going on between the same M'Kenzie and the same Thomas Sproat with reference to another intended purchase, and with reference to the raising of a sum curiously enough very nearly of the same amount, £1500. This was something over £1500, but it was very nearly the same amount as in the case of the farm of Alexander. That was going on in these same months, February and March 1858. One letter is wrongly dated, apparently in 1856, and that a little misled me at first, but the post-mark is "Malvern, 1858." Therefore it was in those very identical months that this other correspondence was going on about the farm he was minded to buy, and he wanted accommodation as regarded that purchase, just as he wanted accommodation as regarded the purchase of these chattels. The reason for his wanting it in each case was that his property being in Australia he could not readily find the money at once, but if time could be given him he could easily have it remitted to him from Australia. It is in a letter dated 1863 that M'Lellan makes the statement with which so much fault was found, and which was supposed to be wilfully false. It is not at all surprising that M'Lellan should mix up the two transactions, the sums being very nearly the same in each case, and conceive that it was with a view to the other purchase at Tongue Croft, instead of being, as it bears upon the face of it, to be in respect of this purchase on Alexander's farm, that the money was borrowed by Thomas Sproat. What makes it clear to my mind that there was no evil intent in this description, and that it was only a slight error into which M'Lellan had naturally fallen, is that on the face of the bill which is the subject of the whole controversy, and which bill is referred to in the account settled with Scott as a portion of the account, there appears the very purpose for which the bill was given, viz., for the purchase of this particular stock upon the farm. I think, after, that the memory of Mr M'Lellan has been somewhat hardly dealt with in the observations which have been made with reference to the letter which he so wrote.

Upon the whole, my Lords, as regards the merits of this case, upon which that letter has no bearing whatever, I have come to the same conclusion as my noble and learned friend on the woolsack, that this appeal should be dismissed.

Lord Selborne—My Lords, I wish first to observe upon the nature of this action. It is to intercept the personal right of an individual creditor (not now a trustee) by setting up against it a liability of that creditor, incurred by him when at a former time he was a trustee of the debtor's estate, as such trustee to that estate; the action being against that individual trustee only (who is only one out of five who might be liable if a general account were taken), who acted for 3½ years only, and who ceased to act more than eleven years before the action was brought. So that in this action no account could possibly be taken to which for the purposes of complete justice the other trustees or the *cestuique* trust ought to be parties.

Secondly—In such an action as this I hold it to be indispensable that facts sufficient to establish a definite liability of such an amount as to countervail the defender's legal claim (without any such account) should be averred and proved.

I agree with the Lord Justice-Clerk that, if there was a liquidated debt of £1582 by Alexander Sproat to Thomas Sproat's estate at the death of Thomas Sproat, there would be enough both on this record and in the proofs to entitle the Court to say that the defender, having taken no steps to get in that debt or to retain it out of Alexander's share of the estate, ought to be held liable to the trust-estate for a sum sufficient to extinguish his present claim. For this purpose (and for this purpose only) I should be of opinion that the facts appearing both in the documentary and in the parole evidence as to the manner in which the estate of Thomas Sproat has been dealt with by the trustees might properly have been taken into consideration. But my opinion on this point is the same with that of my noble and learned friends; that is, that there was no such debt, and that the transaction was, upon the evidence before us, one of purchase and not of loan.

Thirdly—Then comes the question as to the farming-stock, &c. If I thought that such an account as that which the Lord Chancellor has correctly described as the only possible result of a decision on that question in the appellant's favour could properly be ordered in this suit (apart from a general account of the administration of the trust-estate, taken in the presence of all proper parties), I should be inclined to hold with the Lord Justice-Clerk that, imperfectly as (in this respect) the condescendence is expressed, still there might be enough for this purpose on the record. But I am not of that opinion. I agree with what the Lord Chancellor has said on this point; and further, I doubt much (with my noble and learned friend opposite, Lord Hatherley) whether such an account of some particular matters, constituting part only of the general administration, ought to be taken for the purpose of ascertaining whether one individual trustee has been guilty of wilful default, that trustee not being shown to have been in that respect more negligent or more responsible than the rest. It certainly could not be done in England, and that, not for formal reasons only, but for reasons connected with substantial justice, one of which is that the trustee should be charged or discharged

once for all, so as to bind all parties interested, and another, that he should not lose his rights of constitution against those who on taking a general account might be found equally liable with himself.

With respect to the dealings with the Australian property, I took the argument at the bar to be, that whether Alexander Sproat was or was not liable for the £1582 (or for the value of the farming-stock, &c.) it was the duty of Mr M'Lellan to pay that debt out of Thomas Sproat's estate before allowing any part of it to be received and retained by Alexander Sproat or Mrs Thomson in respect of their shares as residuary legatees, or, at all events, before allowing them to receive and retain so much of the estate as would make what was left insufficient to satisfy this debt, and also to provide for an equal distribution to the other residuary legatees, and that he had in fact acted otherwise, and that to an extent sufficient to cover the full amount of his present claim.

To the case so put (if it had been properly alleged upon the record) it is quite possible that a good defence might have been made on various grounds, some of which were alluded to during the argument. It might, for instance, be that the sale of the Australian lands to Alexander Sproat and Mrs Thomson could have been shown to have rested *in fieri* or on paper only as long as Mr M'Lellan continued a trustee, or that there was a vendor's lien sufficient for the protection of the trust-estate during all that time, and that during that time no loss was incurred nor anything improper done. I do not express any opinion at all upon the question whether such a defence could have been made out or not. But the present record does not raise any such case, nor does it give an opportunity for any such defence. The 16th paragraph of the condescendence not only does not point to this, but (as it appears to me) points to quite a different kind of case; and it is nowhere alleged on the record that any distribution at all has been made of any part of the trust-estate among any of the benficiaries.

I do not think it would be consistent with the spirit and intention of the Act of 1868 to allow an amendment for the purpose of raising an entirely new case of this kind, especially on a point as to which justice would be much more effectually done in a different kind of proceeding. If there ever was a case in which justice required that no substantial departure should be allowed from the grounds of action stated on the record, it is this—First, because a claim founded on default, or *crassa negligentia*, should always be distinctly made and clearly established; secondly, because the pursuer has deliberately chosen not to raise a general action of accounting, but to undertake the burden of proving a specific case in answer to a specific personal demand of the defender; and thirdly, because the action was brought fifteen years after the death of Thomas Sproat, nearly six years after the death of Mr M'Lellan, and more than six years after the other trustees had adjusted an account with him, and more than eleven years after he had retired from the trust.

Lord Blackburn—I also, my Lords, am of opinion that the judgment of the Court below ought to be affirmed.

The case, if I understand it rightly, stands thus—Mrs M'Lellan has brought an action to recover the amount of a bill of exchange; how much may be due upon that bill of exchange is not before the House. We have not to determine that, and we have no materials for determining it; but she has a clear *prima facie* right as executrix to her husband to recover upon that bill of exchange whatever may be the amount due upon it. The answer which is sought to be set up by the appellants as defenders in the action below is this, that there is a sum due from the late Mr M'Lellan's estate, because he, having been trustee upon this estate, has by his *crassa negligentia*, or wilful default, or misappropriation of the property, made himself liable to that estate in an amount exceeding the whole that can be recovered upon this bill of exchange, and that consequently there would be a right to stop the action upon that account.

In order to support that case there have been three grounds of argument started.

One of them is the ground stated in the argument, that M'Lellan when he was one of the trustees was a party to a mode in which the property in Australia was realised and the proceeds brought over to this country, and the effect of that does not seem to me to be that M'Lellan was a party to a transaction in which Alexander Sproat, one of the trustees, and Mrs Thomson (Alexander Sproat asserting at least that he was acting for her—whether he was or not is another matter) purchased the land belonging to Thomas' estate in Australia, and that Mr M'Lellan was assenting to the making of that purchase, and assenting to its being done on the credit, probably, of an equitable mortgage or an unpaid vendor's lien on the property in Australia, and upon the personal credit of Alexander Sproat and Mrs Thomson. I do not think the matter given in the evidence amounts to a paying over prematurely of their shares as beneficiaries. It seems to me to amount to what I have stated, that they had allowed the price (a considerable sum, £8000 or more) of the land in Australia to be taken upon the equitable security of the unpaid vendor's lien upon that property and upon the personal credit of the two. That may have been justified if it was the very best thing for the estate, and if the money could not be brought over better; but *prima facie* it was wrong. It may be that afterwards no evil resulted from it at all; that may or may not be; no inquiry was made into that by the Court below, nor do I think that any inquiry could be made. Whether or not that act, which was *prima facie* a wrongful intromission on the part of Mr M'Lellan, did produce any evil result can hardly be ascertained until an account is taken of the whole of the estate, to see whether Mrs Thomson, whose estate was solvent, did or did not make good that deficiency, and various other matters. It is enough to say that it could not be ascertained until the whole account was taken, and that account has never been taken. There is no blame, I think, attributable to the parties in not proceeding to investigate it, nor to the Lord Ordinary in not proceeding to investigate it, for I quite agree with what was said by my noble and learned friend on the Woolsack, and by both my noble and learned friends who have spoken before me, that upon this record as made up there is not anything which would in any way point to a case of that sort—not an imperfect statement even—not a thing stated in the

wrong way—so that there might have been an amendment to raise the real question between the parties. The question was never so much as thought of or put in such a way that the defender's counsel could have had the slightest knowledge what it was until it came out in evidence. I therefore perfectly agree that upon that ground it is enough to say that there was no relevant allegation whatever upon which that case could be raised.

Then, my Lords, comes the second ground, which is that upon which the Lord Ordinary certainly proceeded. I think all the three Judges in the Inner House, although one of them, Lord Gifford, seemed to think a case had been made upon the ground I mentioned first, do not proceed upon this ground. The Lord Ordinary's position is this:—He says—"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." My Lords, it is very unfortunate that the Lord Ordinary did not enter into detail upon that point. Having seen that he came to the conclusion that Mr M'Lellan was acting as agent for Alexander Sproat, and that M'Lellan put it in the shape that there was a loan, so that Alexander Sproat would be personally a debtor to Thomas Sproat during his lifetime—that it was not a purchase of the property but a loan—having seen that he came to that conclusion—I looked with great attention to the documents, and I am constrained to say that but for the Lord Ordinary having come to the contrary conclusion I should have said I came to the unhesitating conclusion that the transaction was nothing of the sort, and that there was no evidence of it.

In the first place, M'Lellan was not the agent of Alexander Sproat. Now, it is of some importance to remember that, for Alexander Sproat was in debt, and in debt amongst others to the Bank of Scotland. M'Lellan was a writer in Kirkcudbright, and he was also agent for the Bank of Scotland. In the whole transaction which took place M'Lellan was not acting for Alexander Sproat nor for Thomas Sproat, but he was acting because he was the agent of a creditor. It was M'Lellan's duty in acting for that creditor to ascertain that that creditor, the Bank of Scotland, in company with the other creditors, got the most they could get out of the estate of Alexander. He interfered in it to that extent, and no more. He had no correspondence with Thomas Sproat. It does not appear that he acted in any way for Alexander Sproat; but he did this—after applying to the bank for authority to do it, he consented, as representing the bank, one of the principal creditors, to become trustee for the behoof of the creditors, and he consented moreover to use his influence with the other creditors to induce them to consent along with the Bank of Scotland to take 15s. in the pound, and be satisfied with the 15s. in the pound, which was all they could get. In order to do that Alexander Sproat conveyed his property absolutely to M'Lellan as trustee for all of the creditors. M'Lellan entered into an agreement in writing with Thomas Sproat, who was a wealthy man, comparatively speaking, by which it was agreed that the stock and the plenishing upon the farm—in short, all that Alexander had—should be valued to its full value by an independent valuator chosen by both sides—that is to say, both by the creditors for whom M'Lellan was acting and by Thomas Sproat; that the full value being ascertained, Thomas Sproat should pay that value to a trustee to be distributed amongst the creditors, and that Thomas Sproat should take the property thus sold to him.

It is one of the misfortunes arising from the lapse of time in this case that M'Kenzie, although not dead, is incapable of giving evidence. M'Kenzie acted as agent for Alexander Sproat, and he wrote and corresponded with Thomas Sproat, which M'Lellan never did at all throughout the transaction. From M'Kenzie's letters it appears that there was an urging upon Thomas to take the property. He says—"The creditors, when they are satisfied that they have got all they can from Alexander Sproat, will not attach his person. Give the full value of the property, and the property shall be yours." And M'Kenzie says—"In order that you may be safe, not only shall the property be yours, but it would be wise that you should leave it on the farm; it will be almost necessary for your protection that you should become tenant of the farm; if you do that it is almost obvious, on the face of it, that it will be your property and not Alexander's; on the other hand, if you leave Alexander as the tenant of the farm you will run some risk about it." That was perfectly true; it was prudent and good advice. Whether Thomas thought that his becoming liable to pay the rent of the farm, which seems to have amounted to something like £500 a-year, was a dangerous thing, or whether he thought he would risk his chance, I do not know, but the lease was never assigned to Thomas Sproat at all. Alexander remained the tenant, and the plenishing was left on the farm and dealt with by Alexander Sproat afterwards as it was before.

My Lords, having stated this much, one wants to see what evidence there is of the transaction to show that Alexander was liable to Thomas as a person who had borrowed a loan. Alexander Sproat being an insolvent, and being obliged to compound with his creditors for 15s. in the pound, the value of his promise to pay £1500 to his brother would not have been worth the penny stamp which it would have been necessary to put upon the letter which conveyed it to his brother Thomas. But there was no such promise. The very object of the transaction would have been baffled if there had been anything which amounted to saying that the property in the plenishing should belong, whether under an equitable mortgage or in any other way whatever, to Alexander Sproat, Thomas Sproat being merely the creditor who had lent the money. The object was that this stock should not merely seem to be conveyed in such a way that any of the creditors should be unable to come upon it, but that it actually should be conveyed in such a way that the creditors who understood the transaction, as M'Lellan would understand it, acting in their behalf, not on behalf either of Alexander or of Thomas, should know the full value of this stock and plenishing has been paid to us or to our trustee M'Lellan, and will be distributed among us. The stock and plenishing has become the property of Thomas, and has so ceased to be the property of Alexander Sproat that Alexander Sproat has nothing what-

ever to do with it, and cannot touch it. That was the real nature of the transaction which was required. I venture to say, my Lords, with positiveness, that there is not one word in the contemporaneous letters which have been produced before us, nor in the document itself, about a loan. The making of a loan on the making of a trust in favour of Alexander Sproat would have baffled the object, and why we should suppose that the object was baffled by something not appearing on the face of the documents, and which would have rather contradicted them, I do not understand.

Something, to be sure, is relied upon as tending to show that that was the case, and that is, that after the death of Thomas Sproat, M'Lellan wrote two letters, which have been already commented upon. I mean one on the 18th of June 1859 to Alexander Sproat, and one on the 22d of August 1859 to Gell Sproat, a son of Alexander's, and also a trustee. In both of those letters he stated that he had been looking at the papers, and that his view of the transaction was (he states it curiously, a little inconsecutively) that the stock and plenishing must be considered as belonging to Alexander, and that Alexander ought to be charged with the debt of £1500, and with interest from the date of the advance, as a debtor to the estate of Thomas, and the consequence is (it would be true if that was the case) that it should be inserted in the inventory and Government duty paid upon the value of that liability of Alexander Sproat whatever it was. It is not suggested in these letters that Alexander stood in the position of the principal debtor upon the bill, Thomas being surety. That is partly the way in which it has been argued in substance, though not in so many words, at your Lordships' bar, but it is not suggested in the letters at all. For some reason or other Mr M'Lellan thought that the plenishing had passed to Alexander Sproat, but that the consequence was that he became liable upon the bill.

I perfectly agree with my noble and learned friend on the woolsack that that was a conclusion of law and an erroneous conclusion. M'Lellan saw the documents, and he knew quite well that he had received the £1500 for the purpose of distribution among the creditors of Alexander Sproat, but beyond that he knew nothing except what he might have been told in the discussion between himself and his fellow-trustees and by Mrs Thomson and by M'Kenzie, who was then living in Kirkcudbright, and who was then competent to tell him something which he is not now competent to tell. M'Lellan knew no more about it except what he might have learnt from these sources, and he seems to have been persuaded—we do not know how—that his proposal that the debt should be put down in the inventory as being a debt due from Alexander Sproat to Thomas Sproat was a right one. I quite agree that if it had been known in fact that it was a debt it would have been wrong not to put it down, and wrong not to enforce it, and a claim ought to have been made. But if I am right in thinking, what I certainly should advise your Lordships to think, that as a matter of fact the £1500 never was a debt from Alexander to Thomas in his lifetime, it ought not to have been put down as a debt, and could not have been enforced as a debt; and if that be so, it follows at once that that ground fails in fact, and we need not consider it further.

Then, my Lords, lastly comes a third ground, which the facts seem to come nearer to supporting, and that is somewhat hinted at. I think the expression used at your Lordships' bar was "shadowily suggested;" certainly it was not directly stated, as an alternative view of the matter, namely, that if Thomas Sproat did in his lifetime, in March 1858, purchase this plenishing, it was his; that unless he parted with or gave over that plenishing during his lifetime to Alexander, it remained his; and that consequently Alexander, who remained in possession, and who had been allowed to deal with it much as if it was his own, was bound to deliver over to the estate such portions of the plenishing as still remained in specie, and to account for that which did not exist in specie. If I were asked at this distance of time, and upon this very imperfect evidence, to say whether there was any gift by Thomas of this plenishing in his lifetime, or any waiver of his right to claim an account, I should say, I do not see any evidence of it. That Thomas Sproat probably wished and intended to do so, if his life had been prolonged, is likely enough, but I do not see any evidence to show that he actually did it. If that were all, I should say that there was a case well laid—that there had been a mistake—that there had been something wrong done at that time. But, my Lords, it is sought to charge M'Lellan for *crassa negligentia* in this transaction, he being, under the ordinary clause, liable only for his intromissions and wilful default after this lapse of time—it is nineteen years now, but when the action commenced I think it was fifteen or sixteen years after—it is sought to charge him with this transaction after his death, and after all who knew about it are dead except Alexander Sproat, who is now hostile to M'Lellan, and who could only speak from memory, and probably from a memory of things which he imperfectly understood at the time. When we are asked upon that to say, first of all, that if an account had been taken of the dealings with the plenishing up to the death of Thomas, and of what remained of it then, there must have been a serious sum due from Alexander to Thomas' trustees, which account M'Lellan ought to have investigated and found that it was so; and secondly, that there was such default in his not so doing as amounted to *crassa negligentia* (it is not said that he intromitted with the money or took it for himself)—we are asked to take an extremely great stride, and though there is an imperfect allegation on the record pointing to that, there is nothing very definite. Then, farther, in order to make it a case which would be relevant to that for granting a declarator that the bill should not be proceeded upon, it would be necessary to show that in consequence of that malfeasance the property was lost. The Lord Ordinary, it is true, finds that the property was wholly lost, but the condescendence never said so, and in truth I must own that I do not think there is evidence that that point was ever investigated.

Taking all these things together, it seems to me, my Lords, that upon this, which was the only doubtful part of the case to my mind, the question which really arises is this:—Is there allegation enough or evidence enough here to call upon your Lordships to say that Mrs M'Lellan should be stopped from bringing her action upon this loan because there is or may be some liability on the part of her

husband in respect of his not having done this originally? I think, as I said before, that it is more than doubtful whether there would not be a case of evidence which might tend to show, and might, perhaps, if further investigated, actually show, that Thomas Sproat had in his lifetime waived his right to this account from his brother Alexander—that he had in effect so conducted himself as to lead his brother to act as proprietor of the property on the terms of not being bound to account. I think perhaps there is some case that would go in that direction, although, as I have already said, I do not think the evidence is enough to prove it. But to say that Mrs M'Lellan's action upon the loan should be stopped because of M'Lellan's not having insisted at that time that they should proceed in that way, contrary to what was probably what the testator would have wished (that is clear)—perhaps contrary to what the testator had done—is rather too strong a thing now; and moreover I think there is an absence of allegations in the condescendence and an absence of proof that this did really produce mischief to the estate; it may have done so very likely, but as, I say, there is an absence both of allegation and of proof that it did, and consequently it seems to me that that ground also fails; and the result is precisely what the Court of Session in their interlocutor have said, that there being no relevant and proved allegations to support this action it ought to be dismissed. Therefore I perfectly agree that that judgment should be affirmed.

Lord Gordon—Your Lordships have so fully gone into the facts of the case that I think it would be unfortunate that I should detain your Lordships at any length with the remarks which I am about to submit.

The action, as has been explained, is one which has been brought by a judicial factor on Thomas Sproat's estate, and the object of it is to have a declarator from the Court preventing Mrs M'Lellan from suing on a bill for £1500 (I am stating it generally) against the estate of Thomas Sproat. It is a bill drawn by M'Lellan and accepted by Thomas Sproat. It bears upon the face of it to have been for value received in effects at Brighouse.

Now, I will admit, my Lords, that on looking at first at this case, particularly at the letters written in 1859 by M'Lellan, I thought there might be some ground perhaps for taking the view that the advance of £1500 (I am stating it in round numbers) by Thomas Sproat was intended to be a debt as against Alexander Sproat; but after looking upon the form of the draft itself and all the documents connected with it, and especially after the remarks which have been made by my noble and learned friend on the woolsack, I have come clearly to the opinion that all the facts of the case as established by the documents tend to show that there was no debt intended to be created against Alexander Sproat, or at least that we cannot hold that there was a debt intended to be created against Alexander Sproat. That goes very far to dispose of this case, because it is really the foundation of the case of liability or restraint sought to be imposed upon Mrs M'Lellan that there was an intention to create a debt as against Alexander. From the case as presented to us we had to deal partly with the facts as well as with the averments, and I think there is some benefit to the parties, especially to the judicial factor, to be informed after the full consideration which your Lordships have given to the case, and after anxious pleadings from the bar, what are the views which impress your Lordships with respect to this state of the case. I think therefore that there is no ground for proceeding upon the assumption that it was intended to create a debt against Alexander Sproat. The documents all tend to show that it was a sale, and not a gift.

Then, the next part of the case of liability is that the trustees neglected to seek to get possession of the stock which was left in the hands of Alexander Sproat. Now, upon that point your Lordships have expressed the opinion that there really was a fair ground for the trustees entertaining the belief that it was not necessary for them to deal with the stock and the crop on the farm, looking at the footing on which Thomas had left the transaction, and on which it stood at his death. And I think that the opinion of the Lord Justice-Clerk is entitled to considerable weight when he says "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." That perhaps applies more particularly to the question as to whether there was a debt intended, but it also applies, especially having regard to the observations made by the noble and learned Lord who spoke last (Lord Blackburn), to the question of realising the stock and crops.

My Lords, the third ground of alleged liability is that with reference to the Australian property. Now, I am very clearly of opinion that there is a total insufficiency of averment upon that point, and that the judgment of the Court below is quite correct. The Lord Advocate stated that the appellants were placed in peculiar circumstances in this case, and so they were. But when people are making serious charges against trustees (of course I am not making any imputation upon the mode in which this case was conducted) it is their duty to state them specifically. Now, it is true that the Lord Ordinary decided in their favour, but the Inner House were of the contrary opinion, and it was quite competent to them to apply to the Inner House to amend the record. The Court would probably have had considerable difficulty in this case about allowing an amendment to take place, but the appellants did not apply for it. As they have chosen to take a judgment upon the record so framed, I think they must abide by the result upon the record as it comes up. I think therefore, my Lords, that the opinion submitted to your Lordships by my noble and learned friend on the woolsack is correct, and that the appeal should be dismissed.

Interlocutors appealed from affirmed; and appeal dismissed, with costs.