The mode, again, in which all these penalties are to be enforced is regulated by the 28th section, and this is appointed to be done by petition before the Sheriff, or any two Justices of the Peace in the district, at the instance of the clerk of the district board. And for the further enforcement of these regulations and byelaws the 29th section expressly provides that "in the event of any person refusing or neglecting to obey any byelaw made by the commissioners, or any regulation made by the district board, the clerk may apply to the sheriff by summary petition in ordinary form, praying to have such person ordained to obey the same, and the sheriff shall take such proceedings and make such orders thereupon as he shall think just."

Under the Act of 1868 (31 and 32 Vict. c. 123) additional powers are given to district boards to purchase dams, weirs, &c., by agreement, to remove natural obstructions to the passage of fish, and to borrow money to defray the expenses incurred by them. But in other respects no material change is made in the powers or constitution of the district boards. Several new offences are, however, created by this Act, and by the 30th section the same powers are given to the clerks of district boards to prosecute for those offences as are given to them under section 28 of the former statute; and by the 37th section this important provision is made—"That any proprietor of a fishery shall be held to have a good title and interest at law to sue by action any proprietor or occupier of a fishery within the district, or any other person, who shall use any illegal engine, or illegal mode of fishing, for catching salmon within the district."

Having regard to these various provisions of the statutes, I have come to the conclusion that the Lord Ordinary was right in holding that the complainers had no title to sue the present action. They are a purely statutory board, and can only act under and to the extent of the powers given to them by the statutes by which they were established. The matter of the remedy to be given for things done in violation of the statute, and the question who the parties were who were to have the right and title to enforce those remedies, were plainly under the consideration of the Legislature, and duly provided for, as they thought right, when those Acts were being passed. In neither statute, however, is any power given to district boards or their clerks to have recourse to actions at common law of the nature here in question.

In the first statute power is conferred upon them to prosecute for penalties for all offences created by the statute, or enacted in byelaws and regulations made by the board under the powers given to them by the statute. And they have also under the 29th section of that Act the important right to enforce by petition before the Sheriff obedience to the byelaws of the commissioners and to the regulations made by the district board for the preservation of the fisheries in the district, but their powers go no further. When the second Act was passed no alteration was made on these provisions in so far as the right and title of the complainers to take proceedings against offending parties are concerned, although that subject must have again been under consideration, because the right and title of the owners of salmon-fishings to prosecute such an action as the present is specifically dealt with in the 37th section, by which the title of such owners to prosecute is expressly recognised and re-enacted, but no such power is given to district boards.

I have assumed in this opinion that the present action does not expressly bear to be rested on any alleged violation of the statutes. It was, however, suggested in the course of the discussion that as the first part of the prayer of the note of suspension refers to fishing during close time only, it might be said that this action is a complaint of a violation of the 15th section of the Act of 1868, which by sub-section (1) provides a penalty for the offence of taking salmon in close time "by any means other than rod and line." But even in this view the objection to the complainers' title appears to me to be well-founded, and the remedy asked incompetent, because of the rule which I conceive to be settled, that when an offence is created by statute which gives the remedy of a complaint for penalties, the only remedy which can be sustained at the instance of a statutory board is that provided by the statute, viz., a complaint for the recovery of penalties, or a petition before the Sheriff under the 29th section of the Act of 1862.

I am therefore of opinion that the interlocutor of the Lord Ordinary should be adhered to.

The Lord President, Lord Shand, and Lord Adam concurred.

The Court adhered.

Counsel for Complainers—Sol.-Gen. Robertson — Ure. Agents — Thomson, Dickson, & Shaw, W.S.

Counsel for Respondents — W. C. Smith. Agent—W. B. Rainnie, S.S.C.

Wednesday, November 16.

SECOND DIVISION.

[Lord Trayner, Ordinary.

MACPHAIL & SON *v.* A. J. MACLEAN AND E. ERSKINE SCOTT.

Agent and Principal—Trust for Behoof of Creditors—Lease—Security—Possession.

A person conveyed his whole estate to a trustee for behoof of his creditors. The trustee had previously, in security of advances made by him for the purpose of paying these creditors, taken from the truster a lease of his heritable estate, consisting of a farm, which bore that the truster had sold to him the whole stock on the lands let. The lease was qualified by a letter, which, *inter alia*, provided that the truster was to manage the farm for the trustee, and that the price of the stock under the lease should not be paid but be imputed to advances made by the trustee. The trustee's name was entered in the valuation roll of the county as tenant of the farm, but there was no other publication of the trust-deed and lease. The truster was afterwards sequestrated. A firm of merchants who had, in ignorance of the two deeds, supplied goods to the truster for the use of the farm, sued

the trustee for the price of the goods as being really the truster's principal. *Held* (*rev.* Lord Trayner) (1) that the effect of the execution of these deeds was to divest the truster of his estate, and that he had thereafter acted as manager for the trustee; (2) that he had in that capacity ordered the goods; and therefore (3) that the trustee was liable for payment of the goods as the truster's principal to the amount of the trust-estate which he had still in his hands.

Archibald John Maclean of Pennycross, proprietor of the lands of Carsaig, in the island of Mull, granted in favour of Ebenezer Erskine Scott, C.A., Edinburgh, a trust-deed dated 1st December 1881, by which he conveyed his whole heritable and moveable estate to Mr Scott in trust for behoof of his creditors. In security of certain advances to be made by Mr Scott, to meet the demands of Mr Maclean's creditors, he had taken from Mr Maclean a lease of the farm of Carsaig, dated 30th November 1881, for five years, at a yearly rent of £320.

The lease contained this clause—"Further, the said Archibald John Maclean hereby sells, conveys, and makes over to the said Ebenezer Erskine Scott the whole sheep stock, cattle, and horses on the lands hereby let, conform to inventory to be made out and signed as relative hereto; in consideration of which sale and conveyance the said Ebenezer Erskine Scott binds and obliges himself to pay to the said Archibald John Maclean the sum of £2500 sterling, payable by instalments at such times as may hereafter be agreed upon, the last instalment being payable not later than 31st December 1885, and at the expiry of this lease the proprietor or incoming tenant shall be bound to take the sheep stock on the lands, and pay therefor according to the valuation of neutral men mutually chosen."

This lease was qualified by a letter of same date in these terms—"Considering that I have of this date executed in your favour a lease of the farm of Carsaig, by which lease I have made over to you the stock of sheep, &c., on the said farm, and you have become bound to pay to me the sum of £2500 as the estimated value of said stock, and considering that I am about to grant a trust-deed in your favour for behoof of my creditors, and for certain other purposes, I hereby undertake and agree as follows:—*First*, that the price of the sheep stock shall form part of the trust-estate under the said disposition; *second*, that all advances made by you under the said trust shall, until they amount to the said sum of £2500 in the first place, be imputed in payment *pro tanto* of the price of the said stock; *third*, that in the event of said stock eventually proving to be of less value than £2500, the deficiency shall be made good to you by me or out of my estate; *fourth*, that in the event of your so desiring, it shall be in your power, notwithstanding the terms of the said lease, to renounce the same at Whitsunday in any year, on six months' notice given by you of such intention; *fifth*, that as it is contemplated that during your tenancy I shall manage the farm on your behalf, and that the proceeds of the same shall be placed to the credit of my trust-estate, no rent shall be payable by you so long as the proceeds are so applied, but, on the other hand, you shall be entitled to interest on the price of the said stock, so far as advanced and paid by you, and that at the current rate of interest charged by the Scotch banks upon overdrafts."

Mr Scott's name was entered on the valuation roll of the county for 1882 as tenant of the farm, but no other publication was made of the lease or the trust-deed. In October 1886 he removed some stock for wintering, as belonging to him as trustee, and took feeding for them in his own name.

This action was raised by D. Macphail & Son, wholesale and retail merchants in Oban, against Mr Maclean and Mr Scott for the sum of £208, 12s. 9d., for goods specified in an account commencing 8th July 1882 and ending 26th October 1886, alleged to have been supplied by them, on the order of Mr Maclean, for necessary purposes in connection with the farm, and for the use of Mr Maclean and his servants in conducting the farm. There was the following minute of restriction appended to the summons—"The conclusions of the foregoing summons, in so far as directed against the defender E. Erskine Scott, are intended, and are hereby restricted, to be against him as trustee under the trust-deed mentioned in the summons."

The pursuers averred that being in ignorance of the trust-deed, &c., they had imagined that Mr Maclean was the owner in possession of the sheep stock, &c., on the farm. As, however, Mr Scott maintained that he had been in possession of the farm and of the stock and moveables thereon since 1882, and that his name had been entered in the valuation roll as tenant of the farm, they averred that Mr Maclean had had the management of the farm on behalf of Mr Scott, who was therefore liable for the goods sued for as trustee. They averred that the sheep stock had been delivered over to Mr Scott as trustee in 1881 or 1882, and from that date he carried on the farm, and that in 1886 he had, in addition to Mr Maclean, a special representative on the farm who had ordered portions of the goods on the footing that they were to be paid for by Mr Scott.

Defences were lodged for Mr Scott, in which he explained "that the lease of the farm here mentioned was granted to the present defender with the view of giving him legal delivery of the moveables on the farm for trust purposes, but the defender has been advised, and is now satisfied, that it was ineffectual for that purpose, and the defender has not interfered with the management of the farm, nor taken any benefit under said lease. Denied that the said account was incurred on behalf or by the authority of the present defender, either as an individual or as trustee foresaid." Mr Scott admitted liability for goods supplied in April and May 1886, after his representative had gone to Carsaig, and averred that they represented substantially the whole goods supplied by his authority. He explained further that as trustee he was willing to rank the pursuers on any balance of the trust-estate vested in him which might remain after satisfying the purposes of the trust.

The pursuers pleaded—"(1) The pursuers having furnished the goods specified in the account sued for, on the orders and for behoof of the defenders, the pursuers are entitled to decree in terms of the conclusions of the summons, with expenses. (2) The defender Mr Scott being, and

having been, in possession of the said farms, as trustee foresaid, and the said goods having been ordered, received, and used by him for the purposes of the said farms, the pursuers are entitled to decree against him as trustee foresaid."

The defender (Mr Scott) pleaded—"(1) The estate of the defender Mr Maclean having been conveyed to the present defender in trust for certain purposes prior to the contraction of the debt sued for, and the same not having been incurred by the present defender, either as trustee in the management of the trust-estate or as an individual, he is not liable therefor either as trustee foresaid or as an individual, and should be assoilzied from the conclusions of the summons. (2) The said defender not having been in possession of the estate, and not having ordered, received, or used the goods sued for, he is entitled to absolvitor."

After the raising of the action Mr Maclean's estates were sequestrated, and Mr James A. Molleson was appointed trustee thereon. Intimation of the dependence of this process was appointed to be made to him that he might sist himself as party thereto. Mr Scott did not dispute the right of the trustee in bankruptcy to the farm stock on the lands, and the trustee did not lay claim to the stock which Mr Scott had removed for wintering as belonging to him as trustee.

A proof was led, which was chiefly directed to the question of Mr Maclean's position in regard to the estate after granting the lease. While Mr Scott deponed that the object of the lease was to enable him under it to take possession of the stock, as it was supposed that in that way he could get a valid security for his advances, it was proved that Mr Maclean acted as manager of the farm on behalf of Mr Scott, and had ordered the goods sued for in that capacity.

The Lord Ordinary (Trayner) granted decree against Scott for the sum for which he admitted liability, and *quoad ultra* assoilzied him from the conclusions of the summons.

"*Opinion.*—In 1881 the affairs of Mr Maclean having become embarrassed, he applied to the defender Mr Scott, who agreed to make certain advances to pay Mr Maclean's creditors, or at least those of them who were most pressing. The security afforded to Mr Scott was the trust-conveyance dated 1st December 1881, and the lease dated 30th November 1881—the latter being qualified by the letter of even date with the lease.

"It is proved, I think, beyond dispute that after the execution of these several writs Mr Maclean remained in the possession and management of his estate just as he had done before until 1st March 1886, when Mr Scott entered on the possession and management. It is said that between the date of the lease and March 1886 Mr Maclean was the servant or manager for Mr Scott. That, I think, is certainly not the case. The trust-conveyance and the lease were intended to create a security for Mr Scott, and had no other purpose. They did not in fact create the relation of principal and agent, or master and servant, between Mr Scott and Mr Maclean.

"The goods, the price of which is now sued for (so far as delivered prior to March 1886), were delivered by the pursuers to Mr Maclean on his order, and in reliance upon his credit alone. Mr Scott and his connection with Mr Maclean's affairs were during that period entirely unknown to the pursuers. In these circumstances I am of opinion that Mr Scott is not liable to the pursuers for the price of goods supplied prior to 1st March 1886. The principle on which I proceed is well settled—*Eaglesham & Company* v. *Grant*, July 15, 1875, 2 R. 960; *Miller* v. *Downie*, July 20, 1878, 3 R. 548; *Stott* v. *Fender & Crombie*, March 4, 1876, 5 R. 1104; *Newcastle Chemical Manure Company*, November 15, 1881, 9 R. 110. There was also a case of *Hardie* v. *Cameron*, decided by the Second Division of the Court on 29th May 1879 (but not reported), the facts in which more closely resembled the present case than any of the other cases I have cited, where the same principle was applied." . . .

The pursuers reclaimed. In the course of the debate, on the suggestion of the Court that there would be a difficulty in granting decree against a voluntary trustee, after sequestration, they lodged the following minute:—"Salvesen for the pursuers stated that he craved leave to withdraw the minute of restriction, and he at the same time undertook that if decree were pronounced for the sum sued for in terms of the conclusions of the summons against the defender E. Erskine Scott, the said decree would not be enforced personally against the said defender, but would only be made available against the funds and estate secured by the arrestments used on the dependence of this action and the trust-estate held by the said defender."

Argued for the reclaimers—Both on the facts proved and on the face of the lease it was clear that Mr Scott was the true owner in possession of the estate, and that Mr Maclean was nothing more than his manager. Mr Maclean was by the lease divested of, and Mr Scott invested with the ownership, and the evidence showed that Mr Scott in appointing Mr Maclean as manager gave him implied authority to contract debt for the stores necessary for conducting the farm. Mr Scott was in fact Mr Maclean's principal. The fact that this relationship was undisclosed could not avail Mr Scott in giving him a preference over the other creditors of Mr Maclean who had just claims against that estate. This case was then distinguishable from those cited by the Lord Ordinary, which dealt with agreements intended merely to create a security by means of a lease. The relationship of principal and agent having been established, both on the face of the lease and on the proved facts, Scott must be held liable for the furnishings sued for. In none of the cases cited by the Lord Ordinary was there any evidence of authority given to contract debt, and in the case of the *Newcastle Chemical Manure Company*, November 15, 1881, 9 R. 110, both the Lord Ordinary and the Court found that the facts did not disclose the relationship of agent and principal.

The defender replied—All the transactions were for Mr Maclean's benefit, and the end and purpose of the lease was merely to create a security for Mr Scott, who had made large advances to relieve Mr Maclean. The furnishings in question were made on Mr Maclean's order, and the pursuers relied only on his credit. Indeed they had no one else to look to, for they were ignorant of the arrangement embodied in the lease. There was no relationship of princi-

pal and agent established, and the Lord Ordinary in applying the law of the cases cited had taken the sound view.

At advising—

Lord Justice-Clerk—This case raises difficult questions, both on the facts and on the law applicable to them. The action is one at the instance of persons who made furnishings to Mr Maclean of Pennycross, to enable him to continue his farming operations in the farm which he was in possession of, and the question is, whether Mr Erskine Scott, who held a lease of those lands from Mr Maclean, and also held a trust-disposition for payment of Mr Maclean's creditors, is to be held responsible for the furnishings?

Now, if the conveyance to Mr Scott had been simply a security for advances made by him, or simply a means of paying the creditors of Mr Maclean, I should have thought that the case was substantially ruled by the authorities cited by the Lord Ordinary. But it appears to me that there is a distinction—and a very vital one—between those cases, which were cases of conveyances granted substantially in security and without possession following on them, and the present case, which turns simply on this—That Mr Scott held not only this conveyance in trust, but also a lease from Mr Maclean, who had thus divested himself of possession of the farm, and had further granted to Mr Scott a letter expressive of the conditions on which the lease had been granted and was to be held, which stated that it had been agreed between them that Mr Maclean should carry on the farm on behalf of Mr Scott.

It appears to me that when a person having a lease from the proprietor appoints a manager to manage the farm on his behalf, he is responsible for furnishings that are made; and it does not signify in such a case that the articles furnished or the profits of the farm are to go in reality to the manager and not to the real tenant, nor that the party who makes the furnishings does not know who is the real tenant. That is an entirely different case from those others which were quoted, and for this simple reason. Mr Scott was the real party in possession, for a lease means possession, and Mr Maclean did not possess on his radical right of property, but on an obligation to do so on behalf of his own tenant. It is unnecessary to go into the terms of the lease or of the trust-disposition, because substantially there is no difference of opinion on the effect of either the one or the other. How far under the terms of the lease Mr Maclean could put an end to it by simple payment of his debt may be doubtful, but that question does not arise here. In the meantime it is enough to say that it gave Mr Scott all the privileges which a tenant has, and among them the right to possess instead of the landlord. Accordingly, when Mr Maclean comes to grant the letter to which I have alluded, he expressly says that he is to hold on behalf of the tenant. The 5th clause of that letter is in these terms—"As it is contemplated that during your tenancy I shall manage the farm on your behalf, and that the proceeds of the same shall be placed to the credit of my trust-estate, no rent shall be payable by you so long as the proceeds are so applied." The orders therefore which were given by Mr Maclean, and the whole of his possession, were on behalf of Mr Scott, and accordingly the furnishings which were bought by Mr Maclean were bought on behalf of Mr Scott.

On these grounds therefore, and without going further into any of the questions which have been mooted and canvassed in the cases that were referred to, I am of opinion that as Mr Maclean, who ordered and received the furnishings in dispute, was the hand—and nothing but the hand—of Mr Scott, Mr Scott is responsible for the debts incurred in obtaining them The Lord Ordinary has come to a different conclusion, and has referred to cases of dispositions in security and dispositions *ex facie* absolute, but in reality in security. He says that he thinks that here also the lease was truly a security only—that it was merely the form of a lease without any substance in it—and that as the credit of Mr Maclean was the only thing on which the pursuers proceeded, Mr Scott cannot be held responsible. He says that the relation between Mr Maclean and Mr Scott was neither that of principal and agent, or master and servant. I entirely differ. I think that the relation between the parties was that of principal and agent, and to a certain extent that of master and servant. In other words, any manager appointed by Mr Scott would have been in precisely the same position as Mr Maclean was in giving these orders, and perhaps the best evidence of that is that Mr Scott in the course of these proceedings actually did appoint another manager, who was his agent for some time, and he admits that he is responsible for the orders which that manager gave. Now, I can see no distinction between the case of that manager and Mr Maclean. I am therefore of opinion that the pursuers have a good ground of action here, just as they would have had if the goods had been ordered by the other manager. On the whole matter I think the judgment of the Lord Ordinary ought to be recalled, and decree for the sum sued for pronounced.

Lord Young—I am of the same opinion. The case is an interesting one undoubtedly, but I do not think it involves any question of principle but is really a question of fact, namely this—In what relation did Mr Scott stand to the farm in question? and in what circumstances was the debt incurred which is admittedly resting-owing?

The action is for an account running from 8th July 1882 to 26th October 1886, the goods being supplied on the order of Mr Maclean, "for necessary purposes in connection with the said farm, and for the use of himself and his servants in conducting the said farm, and the said goods were furnished and delivered by the pursuers to the said defender, and were used for the said purposes." It was incumbent on the pursuer to establish that as the foundation of his case, and there is such evidence on the subject that we had no argument to the contrary. I assume therefore that the account was incurred, that that was the nature of it, and that it is still unpaid.

Now, what was Mr Scott's relation to the farm for the period during which these goods were being supplied. I think it is quite clear that he was creditor in possession, and that the farm was being conducted with a view to enable him to obtain payment of his debt out of his debtor's pro-

perty. At that period Mr Maclean, the proprietor of the land, was completely divested of the property by a deed dated 1st December 1881. A deed executed in trust, no doubt, but still one which completely divested him, and completely invested Mr Scott. But Mr Scott, intending to take the position of a creditor in possession, and in order to obtain payment of his debt, on the day before divesting his debtor of his property, on the 30th of November, namely, obtained a lease from him of the whole estate for a period of years. More than that, he bought from his debtor by a proper contract of purchase and sale the whole stock on the farm. So that immediately after the execution of the lease he is the tenant of the farm, and immediately on the completion of the contract of purchase and sale he is the proprietor of the stock and implements, and everything on the farm. And he actually enters into possession by appointing a manager. He is at liberty to appoint anyone as manager who will accept the appointment, and he may very well select his own debtor as he did. One can easily see reasons for that course. Now, that was the position of matters during the period when the account was being incurred. Mr Scott tenant in possession, with his own debtor as his manager. This is kept secret—I do not suppose for a moment for any discreditable purpose, but from considerations of delicacy towards his client and debtor Mr Maclean. Of course that is commendable, but we must take care that such delicacy is not exercised to the loss of other people, and what is now aimed at is that Mr Scott, through the position he has come to occupy, is to have his own debt paid preferably to the debts of other people. That is really what it comes to. This case is just a competition between the pursuers, the Messrs Macphail, who furnished the goods between 1882 and 1886, and Mr Scott, as to which of them should get paid preferably.

When the case came originally before us there was this minute upon the record—"The conclusions of the summons, in so far as directed against the defender E. Erskine Scott, are intended and are hereby restricted to be against him as trustee under the trust-deed mentioned in the summons." After the case had been partially discussed it occurred to some members of the Court—I rather think also to the bar—that there might be some inconvenience through the existence of this restriction, and accordingly a minute was lodged on 19th July in these terms—"Salvesen for the pursuers stated that he craved leave to withdraw the minute of restriction, and he at the same time undertook that if decree were pronounced for the sum sued for in terms of the conclusions of the summons against the defender E. Erskine Scott, the said decree would not be enforced personally against the said defenders, but would only be made available against the funds and estate secured by the arrestments used on the dependence of this action, and the trust-estate held by the said defender." That makes it clear to demonstration that this is a competition for a preference between Mr Scott and Macphail & Son. And it is part of Mr Scott's case here that Macphail & Son were in ignorance of the fact that Mr Maclean had been divested of his property and of possession, and was merely Mr Scott's manager. It is so stated boldly on record by Mr Scott in his answers—"Admitted that the trust-deed here mentioned was granted on 1st December 1881, but was never published, and that the present defender's name was entered in the valuation roll as here mentioned. Admitted that from 1st March last till the sequestration of Mr Maclean, the defender had a special representative residing on the farm. *Quoad ultra* not admitted, and explained . . . (2) that the lease of the farm here mentioned was granted to the present defender with the view of giving him legal delivery of the moveables on the farm for trust purposes, but the defender has been advised and is now satisfied that it was ineffectual for that purpose." Upon my word I do not know how he should have been so advised. If a man takes a lease and buys stock and puts a man in possession I think there is abundant delivery. At all events, the stocking which was arrested by this creditor, to secure his debt incurred in maintaining the stocking, has been removed. This particular creditor has removed them, and sold them as his own. Now, what is the state of matters which that gives rise to? It is equivalent to saying this—"You shall have no claim against me, because you were ignorant that Maclean had been completely divested and I completely invested; your claim therefore shall be dealt with, not according to the true state of the facts, but according to that knowledge. But, on the other hand, in respect of that true state of the facts of which you were ignorant, I claim a preference over you upon the stock of the farm." In short, it comes to this, that the true state of the facts is to avail Mr Scott against one who was ignorant of the true state, but not so as to give that ignorant person any corresponding claim against Mr Scott.

Now, I do not think that that is just, or that it can possibly be according to any principle of law. One view or the other must be taken and pursued consistently. Mr Scott may deal with Macphail & Son as if the true state of the facts did not exist, inasmuch as Macphail & Son were ignorant of them. In that view he must regard the stock as not having been arrested, as not having been withdrawn from the ostensible possession of its ostensible owner, and must look upon Mr Maclean as himself getting supplies from tradesmen for the maintenance of that stock—in short, as the owner, as in a question with those who furnished these supplies — or he may deal with Macphail & Son on the footing of the true state of the facts, and regard Mr Maclean as manager and not as owner, and on that alternative Mr Scott, as the real owner for whose benefit and on whose account Mr Maclean obtained these supplies, must be held responsible for the payment of them. To say that Mr Scott is to take the whole proceeds—the whole fund out of which the debt is to be paid—and not to be responsible for the debt, would in my opinion be to proclaim a dishonest principle. A party who takes such a fund must be liable for the debts which affect it. That is the principle upon which there is liability on the part of anyone who shares in the profits of a company. And if Mr Scott, to pay his debt, is to take the whole proceeds of the farm and use the stock for his own purposes—that is, to pay his own debt—shall he be allowed to say that he is not to be liable for fur-

nishings supplied during the time he was owner, and owner for the purpose of paying his debt? I cannot hold that. Nobody can strip another of all he possesses and invest himself, and then say that anyone furnishing supplies in ignorance of that arrangement is to proceed against the divested debtor, and have no claim against the person behind simply because he was ignorant of the arrangement.

On the whole matter I agree that the pursuers must have decree against Mr Scott.

LORD CRAIGHILL — I concur. I think the present case is easily distinguishable from all the cases referred to by the Lord Ordinary. The elements of distinction are the lease and possession following on it, together with the acquisition of all the personal property. I think the pursuers are entitled to decree.

LORD RUTHERFURD CLARK—I also think the pursuers are entitled to decree. I think the case presents to us merely a question of fact—the question whether the accounts were incurred by Mr Maclean as agent for Mr Scott. I am of opinion that it is proved by the evidence in this case that this was the relation which subsisted between these two persons, and that Mr Scott therefore is liable as Mr Maclean's principal. That is, I think, sufficient for the decision of the case, and I do not think it necessary to go into any other matters.

The Court pronounced this interlocutor:—

"The Lords allow the minute of restriction annexed to the summons to be withdrawn, and the minute for the pursuers to be received, and having heard counsel for the parties on the reclaiming-note, Recal the Lord Ordinary's interlocutor, and decern against the defender Ebenezer Erskine Scott in terms of the conclusions of the summons, subject to the conditions set forth in the said minute."

Counsel for Reclaimers—Salvesen. Agents—Gill & Pringle, W.S.

Counsel for Respondents — C. N. Johnston. Agent—F. J. Martin, W.S.

Saturday, November 5.

OUTER HOUSE.

[Lord M'Laren, Ordinary.

UNION BANK *v.* GRACIE & OTHERS.

Presumption of Life Limitation (Scotland) Act 1881 (44 *and* 45 *Vict. cap.* 47)—*Multiplepoinding.*

In an action of multiplepoinding for the distribution of the moveable estate of a person deceased, the claimants were her next-of-kin, and were also the "persons entitled to succeed" under the Presumption of Life Limitation (Scotland) Act 1881 to a brother of the deceased in whose favour she had made a will. From the averments upon record there was a presumption that this brother had died, but under the 8th section of the statute the presumption was that he had died at a date before the succession to his sister opened.

The Lord Ordinary, without proof, ranked and preferred the claimants, for aught yet seen, subject to the declaration that in the event of a claim being established in the name of the brother, the claimants should be bound to repay.

This was an action of multiplepoinding for the distribution of the moveable estate of the deceased Miss Jane Ogilvy, consisting of a sum of £303, 2s. 5d., in which the nominal raisers were the Union Bank of Scotland; and the real raisers, defenders and claimants, were nephews and nieces of Miss Jane Ogilvy, and her next-of-kin.

The circumstances under which the action was brought were these—Miss Ogilvy died on 17th February 1883, leaving a will by which she made over her whole estate to her brother William Ogilvy, and in the event of his predecease, then to his lawful children. In the condescendence annexed to the summons it was stated that William Ogilvy went to South Africa in 1861, and had not, so far as the defenders knew, ever returned. The last letter from him was received on 15th April 1872, and stated that he was ill and in hospital at "Diamonds-fields, Colesberg," South Africa. He was at that date unmarried. The real raisers averred that careful inquiry was made by the representatives of a person who held a policy of insurance on William Ogilvy's life, but that they did not succeed in getting any information about him, and that the insurance company were satisfied that there was a reasonable presumption that William Ogilvy had died, and made payment accordingly.

There was also this averment—"Under the provisions of The Presumption of Life Limitation (Scotland) Act 1881, the defenders being the 'persons entitled to succeed' to the said William Ogilvy, would be entitled to ask the Court to grant authority to them to 'make up a title to receive and discharge, possess and enjoy, sell or dispose of' the moveable estate to which the said William Ogilvy became entitled under the settlement of the deceased Miss Jane Ogilvy, and which vested in him at her death on 17th February 1883. Under the 8th section of that statute, however, the said William Ogilvy must be presumed to have died on 15th April 1879, being the day which would complete a period of seven years from the time of his last being heard of. As the succession to Miss Jane Ogilvy did not open until 17th February 1883, the real raisers are not in a position to make application under the said Act for authority to make up a title to receive and discharge the said sum of £303, 2s. 5d., forming the fund *in medio* in the present action, and in these circumstances the present action has become necessary."

The Lord Ordinary (M'LAREN) on 5th November 1887, without proof, pronounced this interlocutor:—"Having heard counsel, and in respect no other claim has been lodged, and no objection stated, for aught yet seen, ranks and prefers the claimants Mrs Margaret Ogilvy or Gracie and others to the whole fund *in medio*, in terms of their claim, No. 6 of process, and decerns, subject to the declaration that in the event of a claim being hereafter successfully maintained in the name of William Ogilvy (alleged to be deceased) the