when there were conflicting claims against the estate—Bankton, iii. 8, 88; Ersk. Inst. iii. 9, 43. There were competing claims here, and that was sufficient to justify the action; it was not necessary that there should be double distress—*M'Dougal's Trustees*, July 9, 1830, 8 Sh. 1036. The only case apparently in favour of the view that the process was incompetent was *Robb's Trustees* v. *Robb*, July 3, 1880, 7 R. 1049, but there the trustees objected to the action of multiplepoinding being brought; here it had been brought in the name and with the concurrence of the executrix. The claim here made was larger than the whole free residue, and in any case would render the estate insolvent, which was a sufficient reason for bringing a multiplepoinding to settle the claims of all the creditors.

Argued for the respondent—The action of multiplepoinding was incompetent, and in any view it was inexpedient. There were not disputed claims here. The only matter in dispute was the amount of Ann Robertson's claim, which had been properly determined in a separate action of constitution at her instance. The multiplepoinding had been brought not by the executrix, but by one of the creditors as real raiser. A creditor was not entitled to make the whole estate the fund *in medio* of a multiplepoinding because one claim was larger than the executrix and the creditors were prepared to admit. The case of *Robb's Trustees*, and especially Lord Gifford's opinion, supported this contention. It was unadvisable that this small estate should be lessened by the expenses of a multiplepoinding.

At advising—

Lord Young—The question here is regarding the competency of an action of multiplepoinding, brought in name of Elizabeth Duffus or Jamieson, executrix-dative on the estate of the late Peter Duffus, a crofter, she being designed as the pursuer and nominal raiser, and the real raiser being a creditor on the estate of the name of Dallas. There are some six or nine creditors called as defenders, one of them being Ann Robertson. The executrix, we were told, assents to the action being brought in her name by one of the creditors on the estate on which she is the executrix, and all the creditors assent to this form of action with the exception of Ann Robertson, who says it is incompetent. The nature of her claim has been explained to us. She was a servant of the deceased, and her claim amounted to £104. By reason of that claim the estate, the whole amount of which was only £94, was unable to pay the creditors in full, and this action of multiplepoinding was raised. Now what is the objection to this form of action? I cannot conceive any, and I must look at it as if the action had been raised by the executrix herself. Now, Mr Sym, with that candour which we always expect from him, and which he always displays, admitted that an executrix who finds claims made in excess of the estate may raise a multiplepoinding for exoneration. But what difference does it make whether it was originally brought by her, or approbated by her when brought by one of the creditors? I can see no reason for drawing a distinction.

It appears that Ann Robertson had got the length of raising a summons against the executrix in another action to have the amount of her claim against the deceased's estate determined. Well, I think the proper course for the executrix was to bring a multiplepoinding, or when a multiplepoinding was brought in her name by a creditor, to bring the matter under the notice of the Court—it was the same Sheriff—and have the action brought under the multiplepoinding, but what happened was this. The learned Sheriff, I suppose at the instance of Ann Robertson, sisted the action of multiplepoinding until the amount of her claim had been settled in the other action. I cannot comprehend the course followed by the Sheriff. It was the reverse of the right course, which was to have held Ann Robertson's summons in the other action as a claim in the action of multiplepoinding. After sisting the multiplepoinding until the other action had been otherwise decided, the Sheriff then considered the competency of the multiplepoinding, and held that it was incompetent. I think he was wrong. I am of opinion it was competent, and that the appeal must be sustained, and the appellant found entitled to expenses.

Lord Rutherfurd Clark concurred.

Lord Lee—I concur. I think that this is not a case of a creditor taking the administration of the estate out of the hands of the executrix against her will by means of a multiplepoinding.

Counsel for the Appellants—Low—Kennedy. Agent—D. Lister Shand, W.S.

Counsel for the Respondent Ann Robertson—Sym. Agent—W. B. Rainnie, S.S.C.

Tuesday, October 23.

SECOND DIVISION.

[Lord Trayner, Ordinary.

FORD & SONS *v.* STEPHENSON.

Trust for Creditors—Principal and Agent—Right in Security.

A trader conveyed his whole estates, including his business, to a trustee for behoof of his creditors. In terms of the trust, the trader continued to conduct the business as manager for the trustee, and ordered the necessary supplies, which were paid for by the trustee. A merchant who in knowledge of the trust arrangement had supplied goods, raised an action against the trustee, as principal of the trader, for the price thereof. *Held* (*rev.* Lord Trayner) that the trustee was liable for payment of these goods because they had been ordered by his manager.

This was an action by William Ford & Sons, merchants, Leith, against Richard Stephenson, ironmonger, Duns, for payment of an account for goods supplied to the late Matthew Wilson, formerly grocer in Duns, for which the defender was said to be liable.

On 26th June 1866 the said Matthew Wilson, on the narrative that his affairs had become embarrassed, and that the defender had made advances to him, and was willing to undertake the

management of his affairs for behoof of him and his creditors, executed a trust-deed whereby he made the following disposition:—"Therefore I do hereby dispone, assign, and convey to and in favour of the said Richard Stephenson, as trustee, for behoof of me and all my just and lawful creditors, my whole estate and effects, heritable and moveable, real and personal, presently belonging and owing to me, or which may belong and be owing to me, or to which I may acquire right during the subsistence of this trust, and particularly without prejudice to the said generality, my whole stock-in-trade, shop fittings, household furniture, and the whole debts due and owing to me, conform to list and inventory thereof hereunto annexed, with the whole writs, vouchers, and instructions thereof, and all that has followed or may follow thereupon, and my whole right and interest therein, present and future, excepting always from this trust the foresaid policies of life assurance; but declaring that these presents are granted by me and shall be accepted in trust for the uses, ends, and purposes, with the powers, and under the conditions, provisions, and declarations underwritten, namely *Primo*, That the said Richard Stephenson shall take the full management and control of my whole means and estate, and that I shall act as his submanager, and that the business of a grocer shall be carried on by the purchase and sale of spirits, porters, ales, groceries, and other such goods, and that for such time as shall seem expedient to the said Richard Stephenson—that is, until it shall seem to him that the business is in so healthy a condition as that he may restore the possession and management to me, and that he may with advantage to me and my creditors resign and upgive the present trust; it being hereby provided that I shall have the occupancy of the dwelling-house, and the use of the household furniture; and the prices and proceeds of sales, and all purchases of goods to supplement the stock shall be under the control and management of the said Richard Stephenson, he being bound to make such weekly allowance for my services as shall seem to him necessary and proper for the maintenance of my family: *Secundo*, All expenses attending the creation and execution and the management of the trust, including a suitable remuneration to the trustee, and payment to the trustee of all advances made, or obligations undertaken by him in execution of the trust, shall be paid out of the first and readiest of my means and estate." By the third purpose Stevenson was empowered at his discretion alone to sell and dispose of the whole estate and effects disponed.

Wilson by a separate deed of assignation disponed and conveyed to the defender two life policies of assurance with the Life Association of Scotland, together for five hundred pounds, in part security of his advances in this present trust.

The pursuers were aware that the deed had been granted shortly after the constitution of the trust, and their knowledge of the general circumstances will appear from the following letter to them of 28th June 1866 from Mr W. K. Hunter, banker, Duns, to whom they had been referred by Wilson:—"Mr Wilson has now executed the trust-deed in favour of Mr Stephenson to which I alluded. The purpose of this trust is to carry on the business under Mr Stephenson's supervision, so that while the trust exists Mr Stephenson is the responsible party. He has opened an account here into which I understand all monies drawn are to be paid, and from which all accounts are to be paid. If, therefore, you have the sanction of Mr Stephenson for any orders you may execute, Mr Stephenson will take care that you are paid. In short, Mr Stephenson has taken the management, and is to carry on the business for behoof of Mr Wilson." Hunter had prepared the trust-deed, but he was not Stephenson's private agent. Thereafter Stephenson met all the pursuers' business accounts by cheques upon the account alluded to by Hunter, which was known as "Stephenson No. 2 account."

On 24th May 1870 the defender wrote to the pursuers:—"As I have entered on a lease of the farm of Chapel, and now reside there, I am not able to devote any of my time to his business, and I am anxious to bring the trust to a close; and I would be glad to consult with you as to the best mode of procedure, so as no interest should suffer by my withdrawal." On 3rd June he again wrote:—"Since I saw you I am glad to say that a friend of Wilson's here has promised to try and negotiate a loan for him in the course of a month; and should he be successful, I hope it will place Wilson in a position to dispense with my services and the trust-deed." On 14th June 1870 Wilson requested the pursuers to draw upon him at three months for the amount of his account, but the pursuers replied that such a course would be contrary to the present arrangement, and they therefore refused to accede to his request. On 16th June 1870 the defender wrote to the pursuers—"It was at my suggestion Mr Wilson wrote you to ask you to draw on him at three months for the amount now due to you, and he has this morning showed me your reply. His estate is now under advance to me of upwards £400, and I am not at this moment in a position to increase this sum; but, as I before stated, negotiations are in progress by some of his friends to raise a sum to relieve me of my advances; and so soon as this is completed it is his intention to revert to the usual plan of paying you monthly. I would be glad if you could accede to his wish to accommodate him at this time. If you cannot, the only thing for it that I can see is to bring his affairs to a standstill and advertise the business." The pursuers replied that pending the completion of the said negotiations they would take Wilson's acceptances with the indorsation of one or more of his friends. They stated—"We would gladly take Wilson's acceptances countersigned by yourself." On 23rd July 1870 the pursuers wrote to the defender pressing for payment of their account, and on 26th July 1870 they again wrote to the defender—"If you wish, as we understand, to withdraw from your present connection with him, and if he has no other security to offer us, then it can only remain to decide what steps should be adopted under the circumstances, and to enable us to judge of that we would like to know the precise nature of the deed under which you are connected with him." The trust-deed was accordingly sent to them for examination. On 1st August 1870 the pursuers wrote to the defender—"We will be sorry if the matter cannot be arranged, but we think it right to intimate to

you that we cannot allow it to remain beyond a day or two more in its present position. If we get sufficient security we would continue to supply Mr Wilson on our very best terms with goods to the amount of £400 or £500 as now; but if, say by Thursday, you find it is not likely to be provided, we trust that you will take immediate action to realise and pay our claim, and render unnecessary any steps we might think otherwise incumbent on us." About the same time an order for grocery goods sent by Wilson to the pursuers was refused by them, as it was not accompanied by the defender's written instructions. Thereupon the defender wrote to the pursuers on 4th August 1870—"I wrote you this forenoon, but since Mr Wilson has shown me your telegram to him of this date. As it is of the utmost importance that the business should be kept in its present state of efficiency till some arrangement is carried through, I will undertake to see you paid for the sugar, which I understand has been ordered by Mr Wilson." On 17th August 1870 the pursuers wrote to the defender—"We think it due to all parties to make you aware of the terms on which we are prepared to go on, and for Wilson's sake hope that they may meet the approval of his friends. First, we are willing to allow our claim to lie over on condition that we receive satisfactory security for its future payment. Second, that Wilson shall reduce the debt by a payment of fifty pounds every six months from this date, and pay interest on the unpaid-up amount at the rate of four per cent. per annum. Third, on this being arranged we agree to give him goods on one month's credit to the extent of £200 stg. It appears to us this is a very favourable arrangement for Wilson, and you will observe that while caring for ourselves we have also looked to the interest of his proposed securities, as in the first place the security is limited to our present debt; then by binding Wilson to reduce the debt, we thereby secure the gradual reduction of their risk; and further, by compelling Wilson to pay his goods by cash in one month he gets the discount of 2 or 2½%, which you are aware makes an immense difference in the year's profit, thereby giving his securities considerable security that they will never be called on. We would also suggest that in order further to induce his friends to befriend him you should agree to continue the trust-deed, which would enable his securities through you to put a stopper at once on Wilson should he be found failing in any respect to implement his engagement, and enable you at any time to look into his affairs. We would also suggest that were his securities to be, say four in number, the risk would be very small indeed to each, especially seeing Wilson is at present £200 stg. above the world and in a good business." Wilson at this time succeeded in arranging with certain parties, two in number, to become security for his debt to the pursuers, and the defender on 25th August 1870 intimated this to the pursuers, and added—"In the meantime send him what goods he may order, and I will see you paid until the arrangement is carried through." On 8th September 1870 he again wrote as follows—"I was only able to-day to see the gentlemen who propose being security to you for Wilson's debt of £350. They propose that you should draw on Wilson in seven bills for the amount named, and at the six months' date. On that being completed, and on my undertaking to continue the trust until the bills are paid up, they will then grant you a letter of obligation to secure you in the due payment of the bills. I trust this will be satisfactory for you." A bond and obligation was granted on 6th September 1870 by the said parties to the pursuers as cautioners along with the defender for the amount of his debt.

About this date it was suggested that the business should be sold, and the question was discussed between the pursuers and the defender, with Wilson's consent. However, no arrangements for this end were completed, and the idea was abandoned.

On 14th April 1882 the defender wrote to the pursuers—"I think it right that you should know from me the present state of Mr M. Wilson's affairs, especially as he intends seeing you tomorrow on the subject. You are aware that several years ago he was seriously embarrassed; at that time he executed a trust-deed in my favour, under which the business has been carried on, and I am glad to say that now he is perfectly solvent. The carrying on of the trust has involved me in raising, for the purpose of carrying on the business efficiently, a considerable sum of money, and I am anxious now to be relieved from this as well as the responsibility of the trust, but Wilson's difficulty seems to be in raising a sufficient capital to allow me to resign, and if this cannot be done, the only other alternative seems to me to dispose of the business. This on Wilson's account would be a serious matter, as the business is a good one, easily managed, and on the whole profitable; besides, the premises have now been bought and improved to suit the requirements of his trade. If you can suggest any way out of the difficulty, perhaps you will communicate it to Wilson, who will call on you sometime tomorrow." On 19th April 1882 he again wrote—"I have been seriously considering the matter as to which Mr Wilson called on you on Saturday. It appears to me the only way practicable under the circumstances is to try and get some-one who wishes to extend their business to take this one and retain Wilson as their manager, and give him either a share of the profits or a salary for his services. It's a nice tidy business, easily managed, with a most select connection, turning over about £4000 per annum, with good profits, and capable of great extension. He has a large and a growing trade of sending whisky to London and the south of England. It would take about £1000 to take the business in its present state, paying for stock and debts, and I must either arrange to let the premises on a long lease, or sell them, as it may be wished. If you know of anything likely to suit, kindly let me know, as well as your opinion as to this proposal." The pursuers replied on the following day—"We are favoured with yours of yesterday. We would be very sorry if Mr Wilson has to give up his business, but we cannot be surprised you should wish to be free of your present responsibility."

At this date efforts were again made for the sale of Wilson's premises, and inquirers were referred by the pursuers, from whom the advertisement proceeded, to the defender. The premises were not sold, and on 5th January 1883,

the pursuers wrote to Wilson—"We have your order for sugar, which has been forwarded, but we must remind you of the request we made in our last that your orders in future should be countersigned by Mr Stephenson. Looking at late delays in payment, we think this arrangement is proper and necessary in the interest of Mr Stephenson, as well as in yours and our own. Don't forget this in sending future orders."

After this date goods were supplied as before by the pursuers on Wilson's order, and were paid for by the defender's cheque, but the orders were not countersigned by the defender. Wilson died in September 1887, and his business was carried on for some months by his daughters, and finally given up. Latterly it had decayed, and the assets afforded about 10s. per £ to the creditors. The goods supplied by the pursuers had been paid for during the continuance of the trust by the defender, except those sent between 16th July and 19th September 1887, the price for which, amounting as restricted to the sum of £175, 17s. 7d., was the subject of this action.

The pursuers averred that in dealing with the business of Wilson they relied on the trust-deed as imposing liability on the defender, and further, that the whole of the account was incurred with the knowledge and approval of the defender, and on his behalf, in his conduct of the said business as trustee for Wilson, and on the order of himself or persons authorised by him. The defender averred that he procured the deed as a security for his advances, and in order that he might secure and enforce some supervision over Wilson's business. The trust-deed was not acted on to the effect of superseding Wilson in the conduct of his business, nor was that intended. The trust-deed was not intimated to creditors or published in any way. Of even date therewith Wilson granted to him, in further security of said advances and interest, an assignation in security of two policies of insurance on his life with the Life Association of Scotland for £200 and £300. His position was that of a secured creditor with some charge of the cash and banking transactions. Further, that no demand for payment of the price of goods supplied by the pursuers to Wilson was ever made to him, and that the pursuers were consulted as to the proposed sales of the business, because their interest as creditors was identical with that of the defender.

At the proof, the facts above narrated were established, and the correspondence produced, and the pursuers admitted that they had never informed the defender that they held him liable for their claims against Wilson.

The Lord Ordinary assoilzied the defender. He added this opinion—"I think it quite clear that the defender and the late Matthew Wilson never stood towards each other in the relation of principal and agent, or master and servant, in connection with Wilson's business, and that therefore the decision in *M'Phail's* case, 15 R. 47, has no application to the present. On the other hand, I am unable to distinguish this case in principle from the cases of *Eaglesham*, 2 R. 960; *Miller*, 3 R. 548; *Stott*, 5 R. 1104; and *Newcastle Chemical Company*, 9 R. 110.

"The trust-deed granted in favour of the defender was intended as a security to him for advances made; and although it authorises the defender to take the management of Mr Wilson's business, and to place Mr Wilson in the position of a sub-manager, the relations between the defender and Mr Wilson never took that shape. Wilson continued in the management of his business, as the pursuers knew. They corresponded with him on that footing. Even if the defender has assumed the position of manager of Wilson's business, that would not have inferred liability for Wilson's debts.

"The pursuers say that in sending the goods to Wilson, the price of which is now sued for, they relied on the defender being liable therefor. They had no good ground for so relying on the defender. They knew the terms of the trust-deed, and should have known that the trustee under such a deed was not personally liable for the debts of the truster. It is not pretended that the defender ever gave the pursuers any reason to suppose that he would be liable for Wilson's debts. On the contrary, the correspondence in process appears to me to establish that, while the pursuers relied on the defender taking a supervision of Wilson's business, they looked to Wilson alone as their debtor."

The pursuers reclaimed, and argued—Wilson was completely divested of all interest in the business in favour of the trustee, and occupied the position of a servant. The deed had been acted upon in this view from the beginning. It might be that the manager of this business conducted personally the bulk of the transactions, but the defender was owner of the business as trustee and was responsible. Thus Wilson's orders were paid by the defender's cheques. The defender's special guarantees were given to orders in excess of the usual course of supplies, and only emphasised his position as security to the pursuers. The distinction between the present case and those cited by the Lord Ordinary was that in the latter the trust-deeds were executed only for a temporary and definite purpose, while here the trust was to subsist as long as the defender considered beneficial to the estate.

Argued for the defender—The real relation of the parties must be considered, and the terms of the trust-deed were insufficient of themselves to decide the question in the case. The deed was executed as a security to the defender over and above the assignations of the policies of assurance in his favour. The business belonged to Wilson, who, though nominally manager, conducted it for his own behoof. The defender had no right to, and enjoyed none of the profits of the business. His whole object was supervision for Wilson's benefit. The correspondence showed that the pursuers did not regard the defender as their security. They sometimes requested a special guarantee from him before fulfilling Wilson's orders—*Eaglesham & Company* v. *Grant*, July 15, 1875, 2 R. 960; *Newcastle Chemical Manure Company* v. *Oliphant & Jamieson*, November 15, 1881, 9 R. 110; *Stott* v. *Fender & Crombie*, July 20, 1878, 5 R. 1104; *Miller* v. *Downie*, March 4, 1876, 3 R. 548; *Macphail & Sons* v. *Maclean's Trustees*, November 16, 1887, 15 R. 47.

At advising—

Lord Young—This is an action at the instance of a firm of merchants for payment of an account for supplies which were made to a grocery business in Duns which was at one time carried on

by a Mr Wilson, who died in September 1887. The period of currency of the account sued for is June 1887 to Wilson's death in September 1887. The amount as ascertained in the minute of restriction is £175, 17s. 7d. The action is not against Wilson's representatives as such, but against Stephenson, an ironmonger in Duns, in whose favour Wilson executed a trust-deed about twenty years ago. We have the trust-deed. I do not detain your Lordships by quoting it at length, but shall state what appears to me its import and effect. Wilson was in labouring circumstances at the time of its date, 26th June 1866. His business had not been going on satisfactorily. Stephenson acted the friendly part of undertaking to carry it on, and put it on a more satisfactory footing. In order to carry it on he had to make some advances. On the other hand, Wilson by the trust-deed divested himself of the business and everything else of which he could divest himself in Stephenson's favour, but as trustee always, in order that he might carry on the business and endeavour by his exertions and by his sensible management to put it on a better footing. By the trust-deed Wilson is completely divested and Stephenson invested subject to the trust. He appointed Wilson himself to carry on the business, as manager and under his supervision, accounting to him by paying over to him all the receipts, that is, the income from the business, while he, Stephenson, paid for the supplies made to the business.

Now, I cannot take the trust-deed as what it was represented to be—that is, a mere sham. I think it was a reality, and that we have not to consider the case of a trust not acted upon, for indeed the trust-deed was acted on. It was acted upon for twenty years. During that period the trustee received the receipts of the business, and paid for the supplies. His purpose was so to carry it on that the receipts should exceed the outgoings, for otherwise it would have been according to his trust and duty to bring the business to an end by selling it if possible, or at all events by bringing the losing concern in some way to an end so as to avoid loss. That during those twenty years Stephenson knew the exact state of matters from day to day is certain, for one of the admitted facts of the case is that the drawings were paid to him, and that the supplies were paid for by him. There was no other source of payment, for Wilson had nothing. He was the manager and had an allowance, but Stephenson had the funds with which the payments were to be made. It is for that reason I say that Stephenson knew the condition of the business for twenty years. The trust subsists still. The business, if worth anything at all, will be sold by the trustee, and in the course of the execution of the trust, for the trust includes all that Wilson possessed.

Now, the pursuers were acquainted with the fact of the trust-deed being granted from the first. In 1866 they, who were the chief merchants who made the supplies, received in reply to their inquiries letters from Hunter, the man of business who prepared the trust-deed, and who must have known what was intended by the parties. He said in one of these, that dated 26th June 1866—"A trust-deed is to be executed in Mr Stephenson's favour giving him the full management of the business, so that any orders you receive will be through Mr Stephenson" and again at 28th June 1886, "Mr Wilson has now executed the trust-deed in favour of Mr Stephenson to which I alluded. The purpose of the trust is to carry on the business under Mr Stephenson's supervision so that while the trust exists Mr Stephenson is the responsible party," Now, that what Mr Hunter there said would be the result of the trust, according to the state of the law, is not in my opinion doubtful. If a trustee carries on a business directly or through the medium of a manager, he is responsible for the debts undertaken in so carrying it on, whether they are undertaken by himself or by the manager acting within the scope of his authority. That is a familiar thing in the case of a trustee in bankruptcy. He may go on with a contract or (to take a familiar instance) continue to manage, with the landlord's consent, the farm of a bankrupt farmer. Or he may appoint the bankrupt as his manager and continue to manage the farm through him. He is responsible in such a case for the debts incurred by himself or by the manager. Now, the question here is whether the account sued for is a debt of the trustee incurred by Stephenson, the trustee, it being immaterial whether it was incurred by himself or by his manager Wilson with his authority. I do not doubt that it is a debt of the trust. Stephenson was not carrying on the business for himself. I observe some confusion on this matter in the examination of the witnesses, and the same was observable at the debate. It seems to have been supposed that the allegation was that Stephenson was carrying on the business for his own profit—a thing never suggested at all. It would have been a breach of trust if he had carried it on for his own profit. The legal responsibility was upon him because the contract was his contract. It is said that Stephenson is not liable for Wilson's debts. He is not. But he is liable for a debt incurred by himself in carrying on a trust to the party with whom he dealt. We know from the trust-deed what Wilson's authority to order the goods was. He was manager, and the orders he gave were from 1866 to 1887 given with Stephenson's sanction, which was shown by his paying the accounts so incurred. It is not suggested that the orders were in excess of his authority with regard to the account in question. Stephenson had a duty to see that the debts incurred in consequence of the orders given did not exceed his power as trustee to pay them—the drawings of the business. He was successful in that to a considerable extent. I observe that in one or two of his letters he alludes to that. He says (on 11th April 1882 in a letter to the pursuers) that the business is a good one, easily managed and on the whole profitable, and in a letter of 19th April 1882 he calls it a nice tidy business easily managed . . . and capable of great extension. That shows that he had performed his duty by seeing that the debts were not getting beyond the drawings, which were his means of meeting them.

Now, two incidents in the conduct of the trust were referred to at the debate. One of them occurred in 1870. It appears that then Stephenson had taken a farm and did not expect to be able to give to the business the same amount of attention as before. He told the pursuers of this fact, saying that he wished to bring his

actings as trustee to an end and be free from the position he occupied. The import of the answer to this letter is that the Fords appreciated his desire, but they pointed out that it would be fair to them that some arrangement should be made as to what was due to them, and that some provision should be made for the future. Nothing came of it at that time, and matters went on as before, Wilson, that is, being manager and accounting to Stephenson. In 1882 there was another manifestation of desire to be free from the trust on the part of Stephenson. He wrote to the Fords—"I think it right that you should know from me the present state of Mr M. Wilson's affairs, especially as he intends seeing you to-morrow on the subject. You are aware that several years ago he was seriously embarrassed; at that time he executed a trust-deed in my favour under which the business has been carried on," and that is the business which it has been argued to us was not carried under the trust at all. I am glad to say that now he is perfectly solvent. The carrying on "of the trust has involved me in raising for the purpose of carrying on the business efficiently a considerable sum of money, and I am now anxious to be relieved of the responsibility of the trust?" (what responsibility, if his present argument is right), "but Wilson's difficulty seems to be in raising a sufficient capital to allow me to resign, and if this cannot be done the only other alternative seems to me to dispose of the business. This on Wilson's account would be a serious matter, as the business is a good one, easily managed, and on the whole profitable; besides, the premises have now been bought and improved to suit the requirements of his trade." I may here notice that we were told in answer to our question that in 1874—thirteen years before the account sued for—Stephenson purchased the premises so that the trust business was thenceforth conducted in premises belonging to him, he charging the trust a rent for them, and taking credit for it out of the trust funds. That puts out of this case any question of need of delivery to transfer to him anything belonging to Wilson or brought into the premises when purchased for the business. The title being with him, and the business being his in trust, he asked the pursuers to assist him in disposing of the business, and on 20th April 1882 they write to him—"We would be very sorry if Mr Wilson has to give up his business, but we cannot be surprised that you should wish to be free of your present responsibility," and go on to say that though no one occurs to them at the time as a purchaser of the business they will communicate with him (Stephenson) if they hear of anyone who would be a likely person to take over the business. It is thus again pointed out to the defender that the pursuers are quite willing that he should be freed from his position on reasonable terms for themselves. If they continued their supplies, they wished him to continue responsible for them until the new arrangement should take place. Then come two letters, one in December 1882 and the other in January 1883. The former is as follows—"We have your telegram, and have forwarded, not without some hesitation, the hhd. whisky. When executing your last order we pointed out that the October goods were not yet paid, and you replied on 18th inst. that a cheque would be sent shortly. Instead of sending a cheque you now order this whisky, and do not say a word in explanation. We trust to have a cheque from you to-morrow, and in future we would like your orders for goods countersigned by Mr Stephenson." The other letter is as follows—"We have your order for sugar, which has been forwarded, but we must remind you of the request we made in our last, that your orders in future should be countersigned by Mr Stephenson. Looking at late delays in payment we think this arrangement is proper and necessary in the interest of Mr Stephenson, as well as in yours and our own. Don't forget this in sending future orders." Now, the meaning which these letters convey to my mind is this. The pursuers were, though business men, and properly alive to their own interests as such, evidently friendly to Wilson and to Stephenson, whose interference in Wilson's affairs, thereby involving himself in responsibility, they appreciated. They wished that no orders, and especially no large orders, should be executed without Stephenson's knowledge. He was kept aware of his responsibility for his manager's orders. They say in the letter "in the interest of Mr Stephenson as well as yours and our own," meaning that the business will thrive according as Stephenson's judgment is followed, and that Stephenson has an interest because he has a responsibility to them. But I cannot read these letters as meaning that between Stephenson and the pursuers goods would henceforth only be supplied when Stephenson signed *the order*. The ordinary law as to a trustee's order by himself or his manager, as I have already explained it, was applicable. It might have been superseded by a special contract that no order was to be good unless Stephenson signed it, but I do not think that that agreement was made. No distinction was made between the future and the past, and it is not said that orders were paid for which had Stephenson's signature, and that payment of others was refused because they were not signed. On the contrary, Stephenson paid for them all. Nor yet is it suggested that any of Wilson's orders were in excess of his authority as manager.

On the whole, therefore, I am unable to reach the conclusion that the defender is not responsible. Nor do I think that in this or in any case it makes any difference to the liability of the trustee that the beneficiary may be liable also. Wilson was no doubt a beneficiary in this trust. Profit made after payment of the debts and restoration of the business to a healthy condition would have gone to him. In the same sense a bankrupt is a beneficiary in the trust held by a trustee in bankruptcy, and rare cases have occurred in which a surplus has existed in a bankruptcy and the bankrupt received it. But the interest of Wilson in this trust makes no difference to the liability of the trustee, who carried on the business for twenty years.

I am unable, on the grounds I have now stated, to concur with the judgment of the Lord Ordinary, and I have reached my conclusion with regret, for I should be sorry if Mr Stephenson's kindness in acting as he did should cause him serious loss. I hope it may not do so. We were

told during the debate that the estate of Wilson will pay at least 10s. per £1. That makes the case not very important in point of money. But I am of opinion that the pursuers must have decree.

Lord Rutherfurd Clark—I am of the same opinion. I think the business was carried on by the defender. He says so in various letters, and his statement is in my judgment in accordance with the fact. He was carrying on the business at the time when the goods were ordered of which the price is here sued for. In these circumstances I hold that the true legal view is that the defender was the purchaser of the goods, and is therefore liable for the price. I therefore agree that the interlocutor ought to be altered.

Lord Lee—I have no difficulty in assenting to the doctrine that a trustee who, in carrying on a business under such a trust as that now before us, orders goods for the purposes of the business, either personally or by another deriving authority from him, must be liable in payment of the price. Nor have I any difficulty in holding with your Lordships that this trust was acted on for some time by the parties. But I have difficulty on the question whether the account sued for was incurred during a time when the trust-deed really represented the relation in which the defender stood to the pursuers. The question is, whether the goods charged for in this account were supplied to the defender's order or to the order of anyone authorised by him? The allegation in condescendence 4 is—"The whole of the said account was incurred with the knowledge and approval of the defender and on his behalf, in his conduct of the said business as trustee for Mr Wilson, and on the order of himself or persons authorised by him." If that is true, then the defender is liable without doubt. The view of the Lord Ordinary is—"I think it quite clear that the defender and the late Matthew Wilson never stood towards each other in the relation of principal and agent or master and servant in connection with Wilson's business." I cannot say that their relations never took that shape, but my difficulty is that there were two periods at which the relation constituted by the trust appears to have been superseded. The first was in 1870, the second in 1882. I think that the correspondence of 1870 shows that the pursuers accepted the defender's intimation as sufficient notice that the trust was then suspended, and that it was not until the defender agreed to continue the trust that the former relation was resumed. I refer particularly to the letters between 25th August and 13th September 1870, as proving that the trust was suspended at that time. But the question is, whether there was not another suspension of the trust in 1882. A letter from the defender to the pursuers intimating his unwillingness to continue in the trust has been read. This was followed by two letters, dated 28th December 1882, and 5th January 1883, which your Lordship has noticed. In the letter of 5th January the pursuers intimated to Mr Wilson their wish that "your orders in future should be countersigned by Mr Stephenson," and they added, "we think this arrangement is proper and necessary in the interests of Mr Stephenson as well as in yours and our own." What is the meaning of these letters. I think it can only be that any orders not so countersigned by the defender would not be regarded by the pursuers as given with his authority, and I should have thought it incumbent on the pursuers to show that the orders, the payment of which is sued for in this account, were so countersigned by the defender. But no argument was addressed to us on this point. It was not contended that there was any change in the relations between the pursuers and the defender at this time in point of fact. I therefore cannot dissent from your Lordship's judgment, but I wish to say, that if it had been shown that these letters were acted upon after January 1883 I might have come to a different conclusion.

The Court recalled the Lord Ordinary's interlocutor, repelled the defences, and gave decree for the sum of £175, 7s. 7d. with expenses.

Counsel for the Pursuer (Reclaimer)—Sol.-Gen. Robertson, Q.C.—G. W. Burnet—Salvesen. Agents—Boyd, Jameson, & Kelly, W.S.

Counsel for the Defender (Respondent)—Comrie Thomson—MacWatt. Agents—Mack & Grant, S.S.C.

Friday, October 26.

FIRST DIVISION.

[Sheriff of the Lothians and Peebles.

GREIG (INSPECTOR OF POOR OF CITY PARISH, EDINBURGH) *v.* SIMPSON (INSPECTOR OF POOR OF SOUTH LEITH).

Poor—Settlement—Residential Settlement—Continuity of Residence.

A workman came to reside in the parish of South Leith at Whitsunday 1879. On 9th April 1884 he left his wife and family in a house which he had taken there, and entered on a business engagement in Cupar, where he lived in lodgings. His wife and family remained in the same house in South Leith until 26th May 1884, when he removed them to a house which he had taken for a year in Cupar, and in which he lived with them until the month of October following. Between 9th April and 26th May he had visited his wife and children nearly every Saturday, and had remained with them until the following Monday morning.

Held that a residential settlement had not been acquired in the parish of South Leith by himself and his family.

In November 1887 George Greig, Inspector of Poor of the City Parish of Edinburgh, raised an action in the Sheriff Court of the Lothians and Peebles at Edinburgh against Andrew Craig Simpson, Inspector of Poor of the parish of South Leith, concluding for payment of £20, 11s. 4d. of outlay by him between 10th September 1886 and 30th September 1887, for the aliment of Abigail Simpson Morham, widow of John Wilson Morham, tailor's cutter, who died on 29th June 1886, and for the aliment and support of their