an averment, on payment of expenses only from the date of the Lord Ordinary's interlocutor.

"In the present case, where the averment of insolvency, though not in the summons, has been made by the pursuer on revisal, the Lord Ordinary would have been disposed to look upon the case of Bolden as a sufficient authority for holding that in modern practice, the averment is of such a kind as may be introduced into the Record without an amendment of the libel, when the general character of the averments in the original summons is such as to make it fair that the pursuer should be allowed to make them distinct and specific on this point, by the introduction of a positive averment of insolvency. But the present case does not seem to warrant such a mitigation of the more strict rule of correct pleading in favour of the pursuer. In the original summons there is no statement implying the existence of any creditor of the granter of the deed under reduction, except the pursuer was a true creditor of Cameron on the account libelled, or a large portion of it, amounting to between £14 and £15, was due at 16th September 1847, the date of granting the deed under reduction. This is the only debt which is said in the original summons to have been owing at that time by Cameron.

"The Lord Ordinary cannot read the summons as even by implication setting forth a case of which the insolvency of Cameron at the date of granting the deed in question was any part. On the contrary, he thinks that the pursuer must be held to have brought his action apparently advisedly, upon the view that he was entitled to set aside the deed without respect to whether Cameron was insolvent at that date or not, and that he purposely abstained from making the averment. If this is the correct view of the summons, the pursuer was not entitled on revisal to introduce a ground of action which he had previously excluded. The matter might have been different as to insolvency at the date of the challenge. That is not explicitly averred in the summons, but perhaps it might be held to be implied in the statement that the pursuer has held a decree for his debt against Cameron since 1851.

"As the Lord Ordinary thinks the action must be dismissed on the second plea, it is unnecessary for him to dispose of the other pleas which have now been argued."

Against this interlocutor the pursuer reclaimed.

SCOTT, for him, argued—1. It is not necessary to aver insolvency in the summons. The Act 19 and 20 Vict., cap. 79, sec. 10, does not require such an averment, as the Act 1621 may be pleaded in answer to the defences. Insolvency may be taken up by way of defence—2 Bell's Com., 183, 184, 186. 2. Even if such an averment were necessary, it is stated *tempestive* in the revised condescendence. In Bolden *v.* Ferguson, 3d March 1863, 1 M'Ph. 522, the Court allowed the record to be opened up and insolvency averred in the revised condescendence. 3. There were conclusions of count and reckoning applicable both to the capital and to the revenue, and in any view, these conclusions as to the revenue were not dependant on the conclusions of the reduction.

The SOLICITOR-GENERAL and A. MONCRIEFF, for the defender, were not called on.

The LORD-PRESIDENT—According to our opinion, the averment of insolvency should have been made in the summons and original condescendence. The objection has been taken all along, the record has been made up on this matter of reduction. Insolvency is an essential element in the action. I see no advantage in allowing the pursuer to amend the proceedings by paying expenses from the beginning. I think it is better that he should bring a new action. I think the real meaning of the summons was that these minutes should be reduced; and this done, then there was an opening for the conclusions for count and reckoning. That is the substance of the action. I think we should adhere to the Lord Ordinary's interlocutor.

The other Judges concurred.

Agent for Pursuer—A. Kelly Morison, S.S.C.

Agent for Defender—John Ross, S.S.C.

FARQUHARSON AND OTHERS *v.* FARQUHARSON.

Trust—Remuneration of Trustees—Commission—Outlay—Accounting. (1.) Held that voluntary trustees were not entitled to remuneration for acting as factor and cashier to the trust, but that they were entitled to reimbursement of outlay. (2.) Circumstances under which trustees were held not liable for sums which it was alleged ought to have been deducted by them from the liferent of the truster's widow.

These are conjoined processes of advocation, declarator, and multiplepoinding. The first is an advocation at the instance of Peter Farquharson of Whitehouse and Others, trustees of the late Andrew Farquharson of Breda, against Robert Farquharson of Allargue; the second, a declarator at the instance of Mr Farquharson of Allargue against the said trustees; and the third, a multiplepoinding at the instance of Mr Duncan, now the only surviving trustee, against Mr Farquharson of Allargue and others.

On 21st December 1860, the Lord Ordinary (Jerviswoode), on the motion of Allargue, and before answer, remitted to Mr W. Moncreiff, accountant, "to consider the objections stated on record to the accounts of the trustees of the late Andrew Farquharson of Breda, in so far as they involve questions of accounting, and to examine the trust-accounts and vouchers and other productions, and report upon the accounting, and, if necessary, to make up a new state of the trust accounts, bringing the same to a balance as at the respective dates when new trustees were assumed."

Mr Moncreiff thereafter made a long report, on which parties were heard. Various objections were stated by all the parties. The Lord Ordinary, on 6th January 1863, disposed of a great many of these objections, and made a new remit to Mr Moncreiff.

Mr Duncan reclaimed.

PATTISON and MACDONALD appeared for him.

CLARK and HUNTER for Allargue.

LORD ADVOCATE and GLOAG for Whitehouse.

In the course of the debate a number of concessions were made by the parties, leaving only three questions to be determined by the Court. The nature of these sufficiently appear from the judgment of the Court, which was delivered by

Lord ARDMILLAN—The questions wich we are now called on to consider have been raised, by objections to an accountant's report in the conjoined processes of multiplepoinding and exoneration and advocation and declarator, at the instance of Mr Duncan, surviving trustee of the late Andrew Farquharson of Breda. Under a remit by the Lord Ordinary of 21st Dec. 1860, the accountant, Mr Moncreiff, considered and disposed of a number of objections by the

parties interested to the accounts of the trustees of the late Mr Farquharson of Breda; and now, to the accountant's report objections were lodged which have been disposed of by the Lord Ordinary in the interlocutor under review.

In the course of the discussion, the field has been greatly narrowed, and I rather think that the points which we can at present decide are only three or four in number. The late Mr Farquharson died on 21st July 1831, leaving a trust-disposition and settlement, of date 23d July 1823, by which he made over his whole estates, heritable and moveable, to Peter Farquharson of Whitehouse, George Campbell Farquharson, and John Farquharson of Houghton, as trustees, and others whom they might assume, for purposes therein set forth, and particularly, after payment of debts, &c., for payment to his widow of the free liferent of the lands of Breda, or possession thereof, under certain burdens; for payment of certain legacies, including £100 to each accepting trustee, the legacies being payable at the first term after the death of the widow. The trustees were directed, subject to the widow's liferent, to execute an entail in favour of certain parties named.

Mr Farquharson was survived by his widow, who died afterwards on 18th December 1856. The accepting trustees were Peter Farquharson of Whitehouse, and George Campbell Farquharson, his son. In 1833 they assumed, as a trustee, Farquharson Taylor, who had been acting as factor in the trust. Mr Peter Farquharson, an original trustee, acted as cashier from 1831 to December 1848. George Campbell Farquharson died in 1838, and the present pursuer, John Duncan, was assumed as a trustee in 1842. In 1848 Mr Duncan succeeded Peter Farquharson as cashier. Peter Farquharson and Farquharson Taylor are now dead, and Mr Duncan is the sole surviving trustee.

The first point relates to the charges by the trustees for commission and trouble as factor and cashier to the trust. The accountant has disallowed the charges, but sustained a very small sum to cover outlays, and the Lord Ordinary has taken the same view, and repelled the objections to the accountant's report.

I am of opinion that there is no permission given by this trust-deed which can support the employment of any one of the trustees, whether original or assumed, as a remunerated factor or cashier for the trust. Express power or permission to appoint and remunerate one of their own number has not been alleged, and such power is not to be lightly inferred. The legacy of £100 to each trustee tends, in my view, rather to support the objection than to support their charge for remuneration.

Where there is nothing in the trust-deed to create an exception and to support a special claim for remuneration, the general rule is now conclusively settled—a rule sound and salutary in principle, and of late years repeatedly enforced—that remuneration, in whatever form, cannot be sustained as a charge against the trust-estate on the part of a trustee appointed or employed by himself or his co-trustees. The office of trustee is gratuitous, and, except in the case of special powers given by the trust-deed, no trustee can secure remunerative employment in the management of the trust-estate. I need not explain my views on this subject at length, nor refer to the authorities, which are well known. The point is quite settled and cannot now be disturbed.

But I am of opinion that these trustees, who might have appointed another party to be factor or cashier, could not be expected to conduct the business of the trust at their own cost; and reimbursement of outlay, to which I think they are entitled, is clearly distinguishable from remuneration to which they are not entitled. It appears to me that the sum of, I think, £1, 1s. a year, allowed for outlay by the accountant, is too small, and while I concur in the views of the Lord Ordinary in regard to the claim for commission or remuneration, I think it desirable that his Lordship, aided by the accountant, should consider, with reference to the duties and charges of these trustees, acting as factor and cashier respectively, what would be a reasonable sum to allow for outlay. I therefore propose that the Lord Ordinary's interlocutor, in so far as he repels entirely the third and fourth objections for Farquharson of Whitehouse, and the third objection for Mr Duncan, to the accountant's report, be recalled, to the extent and effect only of directing the ascertainment of the reasonable allowance to be made for the outlay of the trustees during their management as factor and cashier respectively.

The next point is the objection taken by Farquharson of Whitehouse to the accountant's report, in regard to the sum of £7, 0s. 10½d. per annum for seventeen years with which the accountant has debited the trustees, holding it to be a sum which ought to be deducted from the widow's liferent. The principle of this objection also applies to the second head of the fifth objection for Whitehouse and the fourth for Duncan.

By the trust-deed a legacy is bequeathed to Miss C. Farquharson of £500, and to Mrs Macgregor of £500. These ladies were cousins of the testator, and he appoints their legacies to be paid at the first term after the death of his wife, with interest thereafter till paid. But he declares that his wife should be burdened with the yearly payment during her life to these two ladies of £25 each, out of the rents of Breda liferented by her, being the yearly interest of these legacies. He then adds these important words, "but in the event only that, after payment of my debts and funeral charges, there shall remain no fund to be applied in payment or part payment of their foresaid legacies, it being my intention that the said Mrs Ann Farquharson should only be burdened with the yearly interest of such part thereof as cannot in the meantime be discharged for want of funds." The truster, contemplating a rise of rent on the estate of Breda, gave power to his trustees to borrow money to pay these legacies, but this was to be done without trenching on the widow's income, which is to continue to be the amount of the rents of Breda under the existing leases. It appears that the trustees took the opinion of counsel (the late Mr Robert Jamieson, advocate) on the subject of providing for these two sums of £25 each, and that he was of opinion that these were to be a burden on the widow only till there should be a surplus sufficient to pay them. He accordingly recommended the trustees to borrow £1000 and pay the legacies, thus relieving the widow of the burden. Between the date, when the rents of Breda increased so as to enable the trustees to borrow and pay the legacies, and the date of payment, there was a surplus of annual revenue, unless the trust is charged with the amount of meliorations to tenants under existing leases. These sums the accountant has calculated, and resumed as at the date of ascertaining whether before borrowing the sum for payment of the legacies there was a surplus revenue, and whether in consequence

thereof the interest on the legacies was not a charge on the widow.

I am of opinion that the sum of £7, 0s. 10½d., which has been charged against the widow annually till 1847, ought not to be so charged. Although it may be quite possible, now that the improvements have been made and the amount of meliorations ascertained, to calculate their amount at the date in question, yet I think that they were not then existing debts to any extent. They were not only indefinite and uncertain, but they might never have existed at all. In any view, they were not due till the termination of the leases; but that is not all, the improvements might never have been made, and no debt of the nature of a repayment of meliorations would then have arisen. Looking to the language of this trust-deed, and to the evident intention of the truster to secure his widow in the enjoyment of the full rents of Breda under the existing leases, and not to burden her with the interest of these legacies, if they could be otherwise provided for, I have come to the conclusion that it will not do now, after the lapse of years, to adjust the accounts in this manner, so as to employ the surplus rent in payment of anticipated and uncertain meliorations, and thus to throw the interest of the legacies on the widow, which is in my view contrary to the intention of the trust-deed. I therefore think that the Lord Ordinary's interlocutor, in so far as it deals with the second head of the fifth objection for Farquharson of Whitehouse, and the second head of the fourth objection for Mr Duncan, should be recalled, and that the sum of £7, 0s. 10½d. per annum should not be deducted from the widow's liferent or debited to the trustees in accounting. The principle which I have now explained is also applicable to the first head of the fifth objection for Whitehouse, and the first head of the fourth objection for Mr Duncan.

The next question relates to the deduction of the public burdens on the Mansion-House and Mains of Breda from the widow's liferent, being the third head of the fifth objection for Farquharson of Whitehouse, and the third head of the fourth objection for Mr Duncan.

The widow was entitled, under the trust-deed, to the "free liferent of the whole lands of Breda, or possession of all or any part thereof." The trustees left her in possession of the mansion-house and mains, and accounted to her for the rents of the remainder of the estate; and in apportioning the annual burdens, they charged against the widow the proportion thereof applicable to the lands let, but not the proportion applicable to the mansion-house and mains of which she was in possession. This mode of apportionment was objected to by Farquharson of Allargue. The accountant was of opinion that the words "free liferent" do not mean that the stipend and other public burdens should not be deducted, and that the mansion-house and mains of which the widow was in possession was in no different position than the remainder of the estate, of which she received the rents. He accordingly gave effect to Allargue's objection, and apportioned the burdens annually between the widow and the general trust, according to the amount of rent enjoyed by each, including in the widow's portion the estimated annual value of the mansion-house and mains as taken from the valuation roll of the county.

This apportionment has been objected to by Farquharson of Whitehouse and Mr Duncan, and the Lord Ordinary has repelled their objections, and concurred with the accountant.

The trustees allege that, it being doubtful whether the widow was bound to pay any of these burdens, they effected a compromise with her, whereby she agreed to pay a proportion of the burdens corresponding to the rents she received, but not to the house and lands in her possesion.

I am not able to say that this compromise or agreement has been legally instructed, although there are some indications of arrangements tending thereto, which make it not improbable that there was such a compromise of a question which the trustees considered as attended with doubt and calling for adjustment. I am, however, satisfied that the trustees, taking advice from a very eminent counsel, and proceeding in the *bona fide* management of the trust-estate, acted on such agreement or understanding, and settled with the widow annually on the footing of apportioning the burdens in the manner which they have explained.

I am disposed to think that, after many years of this *bona fide* administration of the trust and actual payments to the widow in accordance with an understanding, if not an agreement, on the subject, the trustees cannot now be called on to repeat and restore to the estate the amount of these annual burdens, on the ground that they ought to have been deducted from the widow's liferent. The matter was one on which an adjustment in order to avoid a dispute was not unnatural or injudicious. Whether that adjustment stood on an agreement or compromise, or on a mere understanding, does not clearly appear; but at least it was accepted and acted on in good faith. If it is to be now disturbed, I think that the question should be tried, not between the objector, Allargue, and the trustees, but between the objector and the widow, to whom the over-payments, if made beyond her just claims, were made by the trustees in *bona fide*, and on an understanding with her.

On this point, therefore, I am of opinion that the interlocutor of the Lord Ordinary repelling the third head of the fifth objection for Farquharson of Whitehouse, and the third head of the fourth objection for Mr Duncan, should be recalled, and the apportionment of the public burdens made by the trustees should be sustained, and the objection of Allargue to that apportionment be repelled accordingly; but that Farquharson of Allargue is entitled to obtain an assignation from the trustees to any right they have to repetition of the amount of these annual burdens from the widow. The seventh objection for Mr Duncan has been conceded, and the interlocutor falls to be altered accordingly.

I am not aware that there are any other points on which the parties have desired a judgment at present. Great part of the Lord Ordinary's judgment has been left without objection; some concessions have been judiciously made; and probably the decision of the points to which I have adverted, with a remit to the Lord Ordinary to proceed further in the cause, is all that can be done at present.

Agent for Mr Duncan—Thomas Ranken, S.S.C.

Agents for Allargue—Morton, Whitehead, & Greig, W.S.

Agent for Whitehouse—John Robertson. S.S.C.

SECOND DIVISION.

COMMISSIONERS OF POLICE OF LEITH *v.* CAMPBELL AND OTHERS.

General Police and Improvement Act 1862—*Jurisdiction—Sheriff.* Jurisdiction of Sheriff under sections 396 and 397 of Act, final and privative.