did *instanter* entitle the executors to pay to any one the whole proceeds of the estate; but I am certainly not of that opinion. I think that persons who deal in an unusual manner with the extinction of a debt are bound to see that it is properly discharged; and if a discharge is got from one who professes to be a mandatory of the creditor, but who has in point of fact no mandate, it is utterly worthless, and can afford no defence in a question of this kind. But it is quite possible that subsequent transactions may validate an irregular discharge like this—as was found, I think, in the case of *Brotherhood*. But in this case there is no reason to think that the partners, present and future, of the Company were aware of the irregularity. They could not have known of it. I do not therefore see how a discharge invalid from the first, and not validated by any subsequent proceedings, can become a ground of *bona fides* in a case like this. There was an attempt to get rid of liability by means of a null deed, and I do not see how mere delay, which did not in any way commit the company to it, can protect the trustees from this claim. A joint-stock company is not in quite the same position as other companies. A joint-stock company consists of a fluctuating body of share-holders—often containing minors, lunatics, and others who have not the opportunity of inspecting the company's books. They are entitled to say, we are bound only by the acts of our mandatories within the bounds of their limited mandates. I am not aware of any case in which it has been held that mere silence on the part of the constituent will validate the unauthorised acts of the limited mandatory when there is no reason to believe that he subsequently knew and approved of them.

The grounds on which I am under the necessity of dissenting from your Lordships are briefly these,—that the trust-estate is still a partner of the company, and that it cannot be held that the funds were paid away in the due administration of the estate, seeing that they were paid away after the trustees knew of the existence of the debt, and that they had no reason to suppose that the discharge they obtained proceeded on a due warrant.

Agents for Pursuers—D. & A. Peddie, W.S.
Agents for Defender—Gibson-Craig, Dalziel & Brodies, W.S.

Friday, June 9.

DOBBIE *v.* DUNCANSON.

Sale—Agreement—Discharge—Relief. *Held* a purchaser of heritage who was to get a free title was the party entitled to sue for relief of the cost of the title, and not the agent who made the agreement; and the purchaser was not barred from insisting in this claim by an informal settlement of the transaction.

Process—Summons. Terms of a summons which held to imply a party was sueing in his own right as well as assignee.

In October 1870 the pursuer bought from the defender certain house property in Glasgow at the price of £16,000. Under the missives of sale the defender was to give the pursuer a valid title to the satisfaction of him or his agent, free of all expense. The missives were signed on 28th October, and on the same day the pursuer engaged a Mr Morrison to act as his agent in the matter. Morrison accordingly prepared a title for Dobbie, and on the 2d of December he and the pursuer and the defender met at the office of the latter's agent for a settlement of the transaction. Morrison alleged that the defender had agreed to give him one per cent. on the sale, and presented an account for £247, being £160 of commission, and £87 of fees for drawing the conveyance. To this account Duncanson objected. He had, he said, been asked by Morrison to sell the property to a client of his, and had, with some reluctance, agreed to do so on the footing that the price was a satisfactory one. He further asserted that Morrison had offered £16,000 on behalf of his client provided he got a free title; and as he (the defender) was averse to this, that Morrison said he would get the pursuer to employ him to prepare the conveyance, and that, in any event, the one per cent of commission should cover everything save the defender's fees to his own agents. He was, therefore, only due £160 in all. This arrangement Morrison denied. No settlement took place on 2d December, as the defender refused to accept the price under deduction of Morrison's account. As the pursuer had not enough money to pay the full price, he granted his promissory-note to Morrison for £193; and on the faith of this and about £46 previously paid to him by the pursuer, he was to advance £240 to Dobbie. The pursuer got dissatisfied with his agent for his dilatoriness, and alarmed about the purchase, as he learned Morrison was not a certificated agent, and on 9th December settled the transaction in his absence, and wrote to the defender to pay no attention to Morrison's letters. The pursuer then requested Morrison to give him back his note, as the purpose for which it had been granted had not been fulfilled, Morrison never having given him a penny of value for it. This Morrison refused to do, retaining it as payment of the debt due to him by Duncanson. Dobbie in consequence gave directions for an action against Morrison, and on the dependence of the summons used arrestments. Eventually, however, as "making the best of a bad bargain," he took an assignation to Morrison's claim, and gave him a discharge.

The present action was accordingly based on the allegation that Duncanson was due £160 to Morrison for commission, and £87 conveyancing fees, and that Morrison had assigned his rights to the pursuer. The summons was thus framed in regard to the latter of these sums—"(2) of the sum of £87, 0s. 6d. sterling, being the amount paid by the pursuer to the said Archibald Maclean Morrison for the preparation of the disposition of the said subjects by the defender to the pursuer in implement of said sale, and which expenses the defender had become bound, by missive of sale between him and the pursuer of date 28th October 1870, to pay; the said two sums, amounting together to £247, 0s. 6d., but under deduction of two sums of £5 and £2 paid by the defender to the said Archibald Maclean Morrison, leaving a balance due to the pursuer of £240, 0s. 6d. sterling;—to which balance of £240, 0s. 6d. sterling the pursuer obtained right by assignation *executed* by the said Archibald Maclean Morrison in favour of the pursuer, of date the 28th January 1871, and duly intimated to the defender." The defender pleaded—"The pursuer is not entitled to recover the amount of the *ad valorem* fee charged by Mr Morrison for the preparation of the said disposi-

tion, nor the expense of extending the same, in respect that (1) Mr Morrison, in preparing the said disposition, did not act as the agent or on the employment of the defender; (2) by the terms of the agreement between the defender and Mr Morrison no further or other expense was to be payable by the defender than the said £160 in name of commission, and the stamp required for the disposition; and (3) Mr Morrison not having been a certificated agent at the time in question, was not and is not entitled to charge *ad valorem* fees." He also maintained that the pursuer was barred from maintaining the present action by the settlement on 9th December in the full knowledge of all the circumstances.

After a proof, the Lord Ordinary (ORMIDALE) held that £160 was all that the defender was liable to pay; that the pursuer sued for the £87 as assignee of Morrison; and that as the right to sue for this was in the pursuer himself, not in Morrison, he could not sue under the assignation; and as Morrison's employment was by the pursuer, not by Duncanson, the pursuer could not sue under that contract; and that, in any event, the defender was protected by the discharge granted by the pursuer on 12th December.

The pursuer reclaimed.

SHAND and LANCASTER for him.

BALFOUR and J. M. LEES in answer.

At advising, the opinion of the Court was delivered by Lord Neaves. Under the missives Dobbie was to have a free title. What a free title meant was not disputed. And Duncanson was either to pay it or reimburse Dobbie in the payment of it. It had been argued that Dobbie sued here only as assignee of Morrison, and this was the view the Lord Ordinary had taken. But in reality Dobbie here sued in his own right, and that he fortified by founding also on the assignation unnecessarily did no harm. But he also sued as assignee of Morrison, for the £160 of commission. Morrison had been the procurer of a purchaser apparently in the matter, and he said it was stipulated he should get one per cent of commission on the price. He was therefore *in petitorio* as to the commission. He had no written evidence to prove this agreement. The only evidence was his own oath so far as supported by the defender's statement. But the defender gave a different account of the matter. No doubt he said one per cent was agreed upon at first, but that was on the footing that according to the usual form he should pay only half of the cost of the titles. But when it was arranged that he was to pay both sides he only agreed on the understanding the pursuer's title was to come out of the £160. The preponderating evidence was in favour of this view of the agreement, and therefore Duncanson should first pay Dobbie the cost of the title, viz., £87, and the balance of £160, less this sum, to Dobbie as assignee of Morrison. The Lord Ordinary had dealt with matters in his interlocutor which were practically of little importance, such as the discharge was, which was not a very formal one. His interlocutor must therefore be recalled, but practically the same result would be arrived at.

Agent for Pursuer—D. J. Macbrair, S.S.C.
Agents for Defender—Ronald & Ritchie, S.S.C.

Saturday, June 10.

FIRST DIVISION.

RITCHIE *v.* RITCHIE.

Proving the tenor—Casus amissionis—*Violence—Adminicles—Draft Deed—Parole Proof.* When a marriage-contract had been violently destroyed by the husband, against whose legal rights its whole clauses were directed, and where the draft from which the deed was originally extended had been lost after the raising of an action of proving the tenor, *Held*, in a subsequent action of proving the tenor, libelling on the copy of the draft contained in the certified copy summons in the former case, that, where the *casus amissionis* was violence, particularly committed by one whom the deed laid under obligation, the general rule of law requiring written adminicles of evidence did not apply, and that in the circumstances of the case the parole evidence established the tenor.

Held farther, that the copy of the missing draft, sworn to by the writer and comparer, was no more than parole evidence.

Question, whether the draft of a deed is a proper adminicle in a proving of the tenor.

This was an action of proving of the tenor of an antenuptial contract of marriage, brought at the instance of Mrs Ritchie against her husband. She had in July 1870 raised an action in the Sheriff-court of Banff (*vide ante*, p. 13), for delivery of the principal deed, in the course of which action the circumstance of its destruction by the husband was discovered. The draft of this document, from which it had been extended for signature, was produced in that action by the agent who drew it, and founded on by the pursuer. Thereafter, on 3d November 1870, Mrs Ritchie brought an action of proving the tenor of her marriage-contract, taking its terms from the above mentioned draft. After raising this action, but before it came before the Court, the draft which had been produced in process was lost. Accordingly the first action was allowed to drop and the present action was raised, founding upon the copy of the said draft, "written by Thomas Valentine Pollock, clerk to Alexander Morison, S.S.C., the pursuer's agent, and compared with the said draft by the said Thomas Valentine Pollock and William Cheyne, also clerk to the said Alexander Morison," and "contained in the certified copy of the summons in the said (first) action of proving the tenor."

Before answer as to the sufficiency of the adminicles, or of the *casus amissionis*, their Lordships "allowed the pursuer to prove the sufficiency of the adminicles, and of the *casus amissionis* of the writ libelled on, the terms of which is sought to be proved, and also to prove the tenor of the said writ," and allowed the defender "a conjunct probation anent all these matters."

From this proof it appeared that the pursuer and defender had been married in 1863; that at the time of the marriage the pursuer was possessed of some little property which she desired to withdraw from the *jus mariti* of her husband; accordingly a marriage-contract excluding the defender and his creditors from the pursuer's property was drawn by Mr Alexander Murray, Solicitor in Portsoy, and extended by his clerk John Thomson James, and executed by the parties in presence of Murray