has beneficially expended money on subjects, is entitled to get back the money. If it was clear here that the Fourth Provident Society took benefit by the sums expended it might have been different, but I see no ground for holding that they got any advantage. I am for adhering *de plano*, reserving any claim Mr Stewart may have on the price of the building.

Lord Neaves—I concur. The doctrine of recompense is one of importance and nicety, and the authorities are not satisfactory upon it. It is an equitable claim, and our law is favourable to the claim. As originally stated by Stair it is overstated, for it is applied even to the case of *mala fides*. The requisites generally are *bona fides*, which means a man with a bad title, in error as to his title, who improves a subject, and the party who takes the subject is bound to recompense such *bona fide* party who has expended money on the subject and may have lost by the transaction. Now, I do not see any error on the part of Stewart. He knew his rights, and there is no room for *bona fides*. There was a laxity both on the part of Stewart and of the society. Is it not possible the party who interposes here is acting *in suo* for himself. This must be made quite clear, that he was not acting so as to increase the reversion. Now, I do not think that is clear at all.

Lord Ormidale—I concur. In regard to the doctrine of recompense, as stated by Lord Stair, the Court must now hold it was too broadly stated as applied to *mala fide* amelioration, after the case of *Barbour* against *Halliday* in 1840.

Here the trustee had a title in virtue of the sequestration, but could only take possession subject to the rights of the secured creditors, such as the Fourth Investment Company. He might have proceeded to sell, subject to an accounting where a preference existed. The creditors have declined to authorise any proceedings. The correspondence between the Fourth Provident Society and Stewart is not quite distinct as to the management, but Mr Stewart kept possession and went on with the amelioration, the Fourth Company doing nothing, being secured. Stewart believed there might be a reversion, but that made his procedure only a kind of speculation on his part, he taking his chance of the result being favourable. I can find no authorities on this point, and to the effect that a party entering into possession in the full knowledge of his own rights and those of other parties on a speculation of this kind has any right of recompense from the true owner.

The Court pronounced the following interlocutor:—

"Repel the remaining objections to Mr Carter's report, and approve thereof; adhere to the remaining findings of the Lord Ordinary's interlocutor of 21st February 1871; find that the pursuers, as trustees of the Fourth Provident Society, are not bound in administering and realising their security to pay the amount expended by the defender William Stewart, as trustee on Wilkie's sequestrated estate, in completing the buildings libelled, reserving the effect of any claim on his part for repayment thereof against the price of the said subjects when sold, and against the other creditors and the estate of the bankrupt Wilkie; farther, decern against the said William Stewart, defender, in terms of the conclusions for removing and for payment of the sum of £90, 15s. 11½d., being the balance of rents received by him as reported by the accountant Mr Carter; reserve any question in regard to the expense of the attempted sales of the property until the same shall come to be sold; find the pursuers entitled to expenses; and remit to the Auditor to tax the same and to report, and decern."

Counsel for Reclaimer—Scott. Agent—James Barton, S.S.C.

Counsel for Respondent—Balfour. Agent—John Robertson, S.S.C.

Tuesday, November 10.

SECOND DIVISION.

[Lord Gifford, Ordinary.

GILMOUR *v.* GILMOUR.

Contract—Residue—Multiplepoinding—Provision to Children.

Circumstances in which two brothers *held* entitled each to a half of an unexpected reversion of their father's estate, after payment of their sisters' preferable claims, without relief *inter se* in respect of such claims.

The fund in this multiplepoinding consisted of the free residue of the trust-estate of the deceased William Gilmour, merchant in Glasgow. The claimants were the two sons of the truster, John and William Gilmour. By the terms of the trust-disposition and settlement of the deceased William Gilmour senior, his four sons were constituted his residuary legatees, share and share alike. By arrangement with the two younger brothers, their shares were assigned to the two elder brothers, John and William, who became their father's sole residuary legatees. After their father's death John and William carried on business in partnership, and in 1850 they assumed a third partner, William Gilmour Cuthbertson. In 1856 an arrangement was made with three of the daughters of the deceased Mr Gilmour, by which they discharged their provisions under their father's settlement to the extent of £7000, the money being credited to the firm of William Gilmour & Company, that firm, and its three partners, granting personal bonds to the lenders for the sums discharged by them. In security of this £7000 William and John Gilmour assigned their interest in their father's estates. On 11th August 1857 an agreement was entered into by the three partners for the retirement of William Gilmour from the firm as at 1st February 1858. This agreement provided, *First*, "That on the 1st February 1858, William Gilmour shall retire from the firm of William Gilmour & Company as a partner, on having a full discharge from all his liabilities as a partner, or a satisfactory security to cover all his responsibilities, with the exception of the lease of the premises, but his discharge by the landlord is to be procured if possible, but the London agency is to remain unchanged until the same 1st February. *Second*, That William Gilmour shall relinquish all claim on the policy on his life for £1000, lodged with the Union Bank of Scotland, the new firm paying future premiums and

relieving William Gilmour's security to the bank for the future payment thereof; also, that William Gilmour relinquish £300 of the £500 at the credit of Mr John Millar, of Orchard, the new firm paying the balance of £200 belonging to his son William; Mr William Gilmour to give up the balance of £1440 or thereabouts, being his moiety of the account in name of John and William Gilmour. *Third*, That William Gilmour shall retain his household furniture and plate, and the new firm shall relinquish any balance at his debit. *Fourth*, That until the 1st of February next, Mr William shall continue to manage the London branch of the business as hitherto; but on the 1st of February Mr William Gilmour shall give up the London agency, and be at liberty to commence business on his own account, and shall receive, in the meantime, not more than £60 per month, which shall be continued to him for three months afterwards, to allow him a reasonable time to seek a new business. The formal documents necessary to carry this agreement into effect, and to announce the dissolution of the partnership in the *London Gazette*, to be prepared by Messrs Drew & Maclure of Glasgow, between both parties." On 4th February the firm of William Gilmour & Company stopped payment. Prior to the stoppage the parties had by letters agreed to postpone the date of the dissolution to 1st July 1858. Thereafter a composition was paid of 11s. in the pound, and the creditors received bills to that amount. On 17th March 1858 the three partners agreed to refer all claims of whatever nature to Mr Balderslie, accountant, and on 20th March he made the following award:—"With reference to the above, it may be stated that the claims therein referred to arise out of an agreement, of date 11th August 1857, entered into between John Gilmour and William G. Cuthbertson, on the one part, and William Gilmour on the other, sole partners of the old firm of William Gilmour & Company, wherein it was stipulated:—(*First*) That, on the 1st day of February 1858, William Gilmour should retire from the firm of William Gilmour & Company as a partner, on having a full discharge from all liabilities as a partner, or a satisfactory security to cover all his responsibilities, with exception of lease of the premises, but a discharge from the landlord to be procured to him if possible, &c. (*Second*) That William Gilmour shall relinquish all claim to policy on his life of £1000, lodged with the Union Bank of Scotland, the new firm paying future premiums, and relieving William Gilmour's security to the bank for the future payment thereof; also, that William Gilmour relinquish £300 of the £500 at the credit of John Millar of Orchard, the new firm paying the balance of £200 belonging to his son William; and William Gilmour shall further relinquish the sum of £1440 or thereabout, being his moiety of account in name of John and William Gilmour. (*Third*) That William Gilmour shall retain his household furniture and plate, and the new firm shall relinquish any balance at his debit; and (*Fourth*) That till 1st February 1858, William Gilmour shall continue to manage the London branch of the business; but that, on 1st February 1858, he shall give up the London agency, and be at liberty to commence business on his own account, and shall receive, in the meantime, not more than £60 per month, which shall be continued to him for three months afterwards, to allow him a reasonable time to seek out a new business. It was at a later period arranged by interchange of letters, and particularly at the request of the new firm, that the date of dissolution should be extended till 1st July 1858; in all other respects the terms of the minute of agreement to remain intact. On the 4th February 1858, the firm of William Gilmour & Company suspended payment, and having exhibited statements and met their creditors, an offer of 11s. per pound, payable 4s. at four months, 4s. at eight months, and 3s. at twelve months, the last instalment, with security, was made, and all but accepted. To this, as a matter of course, William Gilmour is held a party responsible with the other two partners. It was still resolved, however, that the minute of agreement betwixt themselves as partners should be carried out, and the difficulty arose how this was to be amicably effected. Hence this reference, and, as sole arbiter named and appointed, I find and award as follows:—*First*, That the first head of minute of agreement, dated 11th August 1857, shall be maintained in its entirety, including a full discharge from the lease of the premises. *Second*, That the second head of agreement shall also be fully implemented, with exception of the payment of £200 to William Gilmour, part of the sum of £500, which latter sum he shall relinquish in full. *Third*, That the third head of agreement shall remain intact and binding in all its obligations; and *Fourth*, That the dissolution of the contract of copartnery shall be held as of 1st February 1858, the date originally stipulated. That in lieu of the allowance of £60 per month, and of the £200 additional to be relinquished by William Gilmour, in terms of the second head of this finding, and in discharge of all other demands arising out of his connection with the old firm, or demands of the new firm, William Gilmour shall be paid the sum of £400, free of any deduction, one-half thereof as of the date of this award, and the other half on the expiry of six months thereafter, with interest on both sums respectively from these dates till paid.

On 23d and 25th March the following agreement was entered into between the three partners:—"With reference to the within award, the subscribing parties, *videlicet*, John Gilmour and William Gilmour Cuthbertson, *first party*, and William Gilmour, *second party*, do hereby agree as follows, That is to say—*First*, The first parties hereby surrender all claim competent to them in and to the second party's household furniture and effects, and agree to grant at his expense any further writing that may be necessary for completing that surrender. *Second*, That the first party having agreed to pay to the second party the sum of £200 within mentioned, by four equal instalments of £50, and that on the first day of April and on the first day of each of the three following months, which settlement of the said sum of £200 is agreed to be accepted by the second party in lieu of the payment thereof in one sum; and having granted their bill at six months date from the 20th of March current for the other sum of £200, also within mentioned, and interest thereon,—the second party hereby acknowledges the receipt of the said bill, and upon payment of the said bill, and upon payment of the said instalments, discharges the first party accordingly. *Third*, That the second party hereby surrenders all right and claim to the policy of £1000 on his life within referred to as held by the Union Bank, and shall grant any assignment or other deed needful for completing that divestiture, and also surrenders

the sum of £500 standing in the books of William Gilmour & Company at the credit of John Miller of Orchard, as well as any interest remaining to him in the sum of £1440 or thereby, also mentioned within, as his moiety of the account kept in the books of William Gilmour & Company, in name of John and William Gilmour, it being understood that the first party shall pay the premiums upon the said life policy accruing from and after the date at which the last annual premium was paid, and obtain the discharge of the bank of any obligation of the second party held by them for the regular payment of the said premiums. *Fourth*, That a notice of the retirement of the second party from the co-partnership of William Gilmour & Co., with consent of his co-partners, as at 1st February 1858, having been signed of even date herewith, the same shall be published in the *Gazettes* and in two of the Glasgow newspapers in the usual form, at the mutual expense of the parties; and that so soon as the composition bills of the said William Gilmour & Co. have been issued to their creditors, or at all events not later than the 15th April 1858. And *lastly*, In consideration of the said retirement, and of the covenants hereby mutually undertaken by the parties, they have discharged, and hereby mutually and respectively discharge and acquit each other of all claims and demands whatsoever, competent to either party against the other, and arising out of or connected with the foresaid co-partnership of William Gilmour & Co.; and in particular, the said first party shall obtain and deliver to the second party a release, under the hand of the landlord, of his obligations as a partner undertaken by the tacks of the premises occupied by the company in Argyle Street and Adam's court Lane, Glasgow, as soon as practicable; declaring that all claims and demands subsisting prior to the date hereof, are hereby for ever extinguished; reserving only the due implement of this agreement, which the parties bind themselves to fulfil in favour of each other, according to the true spirit and meaning thereof.—In witness, whereof," &c. The residue of old Mr Gilmour's estates, owing to the increase in value of certain lands, unexpectedly turned out to be of the value of upwards of £16,000. Of this residue William Gilmour claimed one half, free and disburdened of any sums paid to his sister, while John Gilmour claimed the whole residue as assignee under the deeds produced, and the facts and circumstances connected with the composition.

On 26th May 1874 the Lord Ordinary (GIFFORD) issued the following interlocutor and note:—

"*Edinburgh, 26th May* 1874.—The Lord Ordinary having heard parties' procurators, and having considered the closed record, documents founded on, proof adduced, and whole process; finds that the claimant William Gilmour junior, is, under the trust-disposition and settlements of his father William Gilmour senior, and under the other deeds and agreements founded on, entitled to one-half of the free residue of the trust-estate of the said William Gilmour senior, and that free and disburdened of the sum of £5877, 3s. 3d. paid by the trustees of the said William Gilmour senior, to Mrs Somerville, Mrs Hall, and Mrs Cuthbertson, three of the daughters of the said William Gilmour senior; therefore ranks and prefers the claimant, the said William Gilmour junior, in terms of the first alternative branch of his claim; ranks and prefers the claimant John Gilmour to the remainder of the free fund *in medio*, and *quoad ultra* repels the claim of the said John Gilmour and decerns; appoints the case to be enrolled, that the amount of the fund *in medio*, and the sums due to the claimants respectively, under the present decree may be ascertained and decerned for; finds the claimant William Gilmour junior entitled to expenses in the composition, and remits the account of said expenses, when lodged, to the Auditor of Court, to tax the same and to report.

"*Note*.—The fund *in medio* in the present case is the free residue of the trust-estate of the late William Gilmour senior, merchant in Glasgow. The only two claimants are two of the truster's sons, John Gilmour and William Gilmour junior, all the other sons and daughters of the truster having been settled with. No question or difficulty has arisen under the terms of old Mr Gilmour's trust-deed, but questions of considerable difficulty have arisen between the claimants John and William Gilmour, in consequence of complicated transactions between them in reference to the dissolution of the firm of William Gilmour & Company, of which they were partners, and also in reference to their father's estate, and in reference to the provisions due to three of their sisters, Mrs Somerville, Mrs Hall, and Mrs Cuthbertson.

"Proof was led at the close of last session, and the whole case would then have been disposed of, but at the request of both parties the case was continued. A day was fixed for hearing in vacation, but again, at the request of both parties, the hearing was adjourned. The Lord Ordinary now disposes of the whole case.

"By the terms of the trust-disposition and settlements of the late William Gilmour senior, his four sons were constituted his residuary legatees, share and share alike. By private arrangements with the two younger sons, James and David, their shares were assigned to their two elder brothers, John and William, who thus became their father's sole residuary legatees, each entitled to one-half of the free residue.

"The claimants, John and William Gilmour, after their father's death carried on business in partnership, and in 1850 they assumed as a third partner their nephew William Gilmour Cuthbertson, and these three partners carried on business under the old firm of William Gilmour & Company. In 1856, apparently with the view of enlarging the capital of William Gilmour & Company, a family arrangement was made with three of the daughters, Mrs Somerville, Mrs Hall, and Mrs Cuthbertson, whereby these ladies, who were entitled to payment of considerable provisions under their father's settlement, discharged these provisions to the extent of £7000, but instead of getting payment thereof, the money was handed or credited to the firm of William Gilmour & Company, and that firm and its three partners granted personal bonds to the three ladies for the sums discharged by them. These bonds expressly bear that the sums therein mentioned, in all £7000, were advanced to, and for behoof of, the company, and the company and its individual partners became bound for the repayment thereof. This £7000 thus became a company debt, although necessarily the individual partners were liable therefor. In security of this £7000, William and John Gilmour, then their father's sole residuary legatees, assigned their interests in their father's estate.

"On 11th August 1857 a deed of agreement

was entered into by the three partners of William Gilmour & Company for the retirement of William Gilmour junior from the firm as at 1st February 1858. This agreement provides that the two remaining partners John Gilmour and W. G. Cuthbertson shall discharge William from all his liabilities as a partner, and give him security for his relief, he giving up, besides his share of the company assets, certain specified sums or claims which belonged to himself as an individual. The terms of this agreement are extremely important, as in the Lord Ordinary's view the main questions in the present competition turn thereon. It was admitted and proved in evidence that at the date of the agreement all parties acted in *optima fide*, and believed the firm of William Gilmour & Company to be perfectly solvent. The Lord Ordinary holds therefore that at its date this agreement formed a binding contract whereby, in consideration of William Gilmour's retirement and of his giving up his share of the company assets, and the special sums mentioned as belonging to him individually, the other two partners became bound to relieve him of all company liabilities. Now it is only necessary to notice in the meantime that by this agreement William Gilmour junior did not give over his half of the residue of his father's estate. His half of the residue was not a company asset, nor was it part of the individual estate which he assigned. Farther, the debts due to the three sisters were company debts, and of these debts William Gilmour was entitled to be relieved. If the agreement then had been *in terminis* carried out, and no insolvency had supervened, the result would have been that the remaining partners, that is the new firm, would have paid the debts due to old Mr Gilmour's three daughters, and William Gilmour would have retained, disburdened, his half of the residue of his father's estate, whatever that residue might turn out to be. If the Lord Ordinary is right in this conclusion, it goes a long way to settle the whole present dispute, for, in his opinion, the whole subsequent occurrences and arrangements really made no difference on the result.

"On 4th February 1858, being three days after the agreed-on date of dissolution, the firm of William Gilmour & Company was compelled suddenly and unexpectedly to stop payment.

"This event took everybody, including the partners, by surprise. It led to investigations, which showed that the firm was insolvent and unable to pay more than from 11s. to 12s. per pound. Now, it might have been a question of some difficulty, whether this unexpected occurrence and this state of matters, unknown to the parties, did not terminate or cancel the agreement of dissolution of 11th August 1857. Prior to the stoppage the parties had, by letters, arranged to postpone the date of dissolution from 1st February to 1st July 1858. It is unnecessary to consider this question, however, for after the company had settled with its creditors by a composition of 11s. per pound, it was fixed, under a reference to Mr Alexander Balderston, accountant in Glasgow, by Mr Balderston's award and by special agreement following thereon, No. 210 of process, that the agreement of dissolution of 11th August 1857 should still subsist, and that William Gilmour junior should, in terms thereof, retire from the firm as at 1st February 1858, the date originally stipulated.

"Some variations were made by the arbiter and by the parties on the special conditions on which William Gilmour should retire as at 1st February 1858, and these variations require to be minutely attended to; but although there are important variations in detail, the Lord Ordinary is of opinion that the substance of the agreement of 11th August 1857 remains untouched, or rather, that it is renewed and ratified in all its essential points.

"In particular, the Lord Ordinary is quite unable to find, either in the original agreement of 11th August 1857, or in the award of Mr Balderston, or in the subsequent agreement following thereon, any undertaking, either express or implied, that William Gilmour shall assign to the new firm, or any of its partners, his half of the residue of his father's estate. Nor can he find any agreement, express or implied, that the debts due to the three sisters, which undoubtedly were company debts, should become or be held to be to any extent the debts of William Gilmour junior, the retiring partner. On the contrary, the whole substance and purview of the award and agreement seem to show that, excepting the sums and subjects specially mentioned, the individual estates of the partners shall remain untouched, and the ultimate incidence of company obligations shall not be interfered with. The very enumeration of particulars leads to this result. A special condition, that certain enumerated particulars of William Gilmour's individual estate shall pass to the firm, implies that nothing else shall pass, and it is quite inconceivable that, if it had been really meant that William Gilmour should assign his share of residue either to the two remaining partners or to his brother John, this should not have been expressly said.

"The Lord Ordinary, therefore, without hesitation, holds that, in the deeds and agreements produced there is no assignation, either express or implied, by William Gilmour, either to his brother, or to his brother and nephew jointly, of his half of the residue of old William Gilmour's estate.

"But the argument of John Gilmour was rested not merely on the agreements and award, but on facts and circumstances connected with the composition arrangement, under which William Gilmour & Company paid their creditors 11s. in the £. These facts and circumstances appear from the parole proof, and from the states and documents produced and referred to therein.

"The argument for John Gilmour, shorty stated, is that, as at common law the whole individual estates of the partners, as well as the company estates, were liable to the company creditors, and as, under the agreement of dissolution, the two remaining partners, John Gilmour and Mr Cuthbertson, paid the whole composition of 11s., so the individual estates of the whole three partners, as well as the company estates, must be held in law to have been assigned to them.

"There is a good deal of plausibility in this argument, stated in a general form, but the Lord Ordinary is of opinion that no such absolute general rule can be laid down, and that it utterly fails when the special circumstances of the present case are taken into account.

"One striking circumstance in the present case, and which indeed may be said to have given rise to all this litigation, is that at the date of the composition arrangement of 1858 it was not expected by any party that old William Gilmour's estate would produce any free residue at all. In

short, all parties assumed that the free residue of old Mr Gilmour's estate was worth nothing. In the state of affairs of William Gilmour & Company, or in the report relative thereto, there is a note showing that the assets of old Mr Gilmour's trust were less than the trust liabilities by a deficiency of £863, 14s. 3d.; and it is added that John and William Gilmour are 'thus deprived of the fortune which they at one time looked for from their father's estate.' Accordingly, in estimating the composition offered, 11s. in the £, no sum whatever is put on the residue of old Mr Gilmour's estate. It is not taken into account. It is not taken from the individual partners John Gilmour and William Gilmour, but it is left untouched, as a *spes* or chance belonging to these gentlemen individually.

"The Lord Ordinary thinks that the result is that, after the composition arrangement was carried through, John Gilmour retained his half of the residue as his individual and personal estate, and that William Gilmour did the same.

"If the question had arisen with Mr Cuthbertson, for example, it is thought that he could not have maintained that both John and William Gilmour had made over to him, as a partner of the new firm, half of their respective shares of the residue of old Mr Gilmour's estate, but this would be the necessary consequence of John Gilmour's argument. Owing to the increase in value of the lands of Oatlands, it now turns out that, instead of there being no residue of old Mr Gilmour's estate, there will now be a free residue of upwards of £16,000. The Lord Ordinary holds that this residue has not been assigned to anyone, either by John Gilmour or by William Gilmour, but is still vested in them respectively, each to the extent of one-half, as part of their individual and personal estate. It never became company property, and they never came under any obligation to make it such. This leads to the repelling of the claim of John Gilmour to the whole fund *in medio*.

"Even if there was an implied obligation to make over their whole individual assets to the new firm, the Lord Ordinary thinks that this must be held as altered and cancelled by the award of Mr Balderston and the agreement following thereon. That award and agreement, as has been shown, ratified and renewed the agreement of dissolution of August 1857, and fixed that certain individual assets should go to the new firm, and nothing more. This agreement is undoubtedly binding, and must receive effect. In short, the right to one-half of the residue of his father's estate having undoubtedly and fully vested in William Gilmour, and he having never parted therewith, or come under any obligation to denude thereof, it still remains vested in him as his individual and absolute property.

"In like manner, the Lord Ordinary is of opinion that the debt due to the three sisters was, and never ceased to become, a proper company debt, of which William Gilmour was entitled to be absolutely relieved. The sisters accepted composition bills for 11s. in the pound of part of their debt, and these bills seem to have been paid, although they have not been recovered, but this did not discharge the assignment in security contained in the bonds. There was no mercantile sequestration, and no obligation to value and deduct securities. The case might have been otherwise had the whole estates been sequestrated and vested in a trustee. When, by the sale of Oatlands, the residue of old Mr Gilmour's estate fortunately became valuable, the daughters recovered the balance of their debt from the residue, and this was done with the consent of both John and William Gilmour. But this did not convert the company debt into an individual debt of William Gilmour. The balance of the debts, just like the composition bills, were debts of the company, and as William Gilmour was to be relieved of all company debts, it follows that his share of the free residue must be disburdened of this company debt.

"It follows that the claimant William Gilmour is entitled to one-half of the residue, free and disburdened of the £5877, 3s. 3d. paid to his sisters under the company's bonds. William Gilmour is, therefore, entitled to be preferred in terms of his claim. The balance of the free residue belongs of course to John Gilmour. As William Gilmour has been successful, he is entitled to expenses."

John Gilmour reclaimed.

At advising—

LORD JUSTICE-CLERK—[After stating the facts]—I think the arrangement of August 1857 came to an end by the intermediate insolvency, and that the rights of parties depend on the agreement of 23d and 25th March 1858. In regard to John Gilmour's claim as assignee of his brother, the Lord Ordinary has repelled it, and I agree with him. The last provision of the agreement is conclusive. Both parties settled on the footing of there being no reversion, and even if John Gilmour could have claimed any reversion he deliberately abandoned it by the agreement. Where a trading firm winds up on a probate liquidation, I doubt if anything is assigned. *Inter socios* that last provision of the agreement is conclusive.

With regard to William Gilmour's claim, I think that the real security held by the sisters for payment of their provisions was not affected by the arrangement entered into between the partners *inter se*, or between Gilmour and Co. and their creditors, and that the result is that each of the brothers is entitled to a half after payment of their sisters' claims, without relief for such claims *inter se*.

LORD NEAVES concurred.

LORD ORMIDALE—This case is very special and peculiar in its circumstances. So much so, that although various general principles and rules of law were introduced into the discussion, the judgment of the Court must, I think, be chiefly governed by the nature and effect of the particular agreements and arrangements founded on by the parties.

In this view, it is unnecessary to consider what would have been the result if, in place of a suspension of payment and settlement by a private composition, there had been a bankruptcy, sequestration, and judicial discharge of Gilmour & Company and its partners, carried out in the ordinary way. Nor do I think that the agreement of August 1857 is of the importance that seemed to be attached to it by at least one of the parties at the discussion, seeing that in consequence of the change of circumstances arising from the unexpected insolvency of Gilmour & Company in February following, new arrangements required to be made, and were made, and a new agreement entered into. The previous agreement, however, of August 1857, is not to be entirely disregarded,

seeing it was, if not wholly, to a large extent renewed by the subsequent one of 1858. It was indeed not only made the foundation of that which was entered into in March 1858, but was, by the latter, expressly referred to as still obligatory. But that must necessarily mean merely obligatory in so far as the altered circumstances permitted.

The only two questions which the Court has been asked to determine are—1st, Whether the reclaimer John Gilmour is entitled to the whole fund *in medio*, being the reversion of old Mr Gilmour's trust estate, arising from the sale of Oaklands, after paying off the daughters' provisions; and 2ndly, Whether he is not, at least, entitled to one half of the fund *in medio*, not subject to, but after the payments which have been made therefrom to the truster's daughters have been deducted, thereby leaving to him and his brother William an equal share each of the residue of their father's estate, free and disburdened of the sisters' provisions, for payment of which it had been by them assigned in security.

In regard to the first of these questions, I concur with your Lordships in opinion that John Gilmour is not entitled to the whole of the reversion in dispute. It was not, and could not be said that there had ever been any express assignment to John Gilmour of the whole of that reversion, nor any express relinquishment by William Gilmour of his half thereof in favour of his brother. The argument of the reclaimer John Gilmour has not proceeded upon any such assumption. On the contrary, it was acknowledged throughout his argument that there was no such express assignment or relinquishment. It was merely maintained that, looking to the whole arrangements of the parties, and in particular having regard to the circumstance that he (John) undertook to pay, and did pay, by composition, all the debts of the company, it must be held as implied that he thereby became entitled to the whole estate of that company and its partners, including the reversionary fund in dispute. A great deal might be said in support of this view, were it not for the important consideration—which cannot be overlooked—arising from the peculiar circumstances which here occur. There is, first, the fact clearly established that in the arrangements in reference to the composition which was paid to the creditors of Gilmour and Company, and the fixing the amount of that composition in place of any reversion from old Mr Gilmour's trust estate being calculated upon, it was assumed upon all hands that there was no such reversion, but that, on the contrary, there would not be sufficient to meet the preferable claims upon the estate. While, therefore, it may be true as a general proposition that the party who pays the creditors upon an insolvent estate, might in ordinary circumstances have right, in the absence of stipulation to the contrary, to that estate in order that he may operate his relief therefrom, it does not follow, at least necessarily, that where the composition arrangement is not a statutory one, but, as here, a private and extrajudicial one, and where, as here also, it proceeded upon the basis of an estimate of the value or worth of certain specific estates or sources of payment, and of these alone, that one of the partners of the insolvent company who pays the composition is to be held entitled by implication merely, to an assignation of anything more than the specific estates or sources of payment in reliance upon which alone he made his calculations and payments. And that such was in reality the footing upon which the parties in this case proceeded is, I think, very materially strengthened not only by the estimate of the means and estates to which the creditors had to look, and on the basis of which the composition was calculated and paid, but also by Mr Balderson's award and the relative agreement which followed upon it. The estimate refers to old Mr Gilmour's trust estate, and expressly bears that in place of there being any reversion to which the creditors could look as a fund of payment, there would not be enough to satisfy preferable claims. The composition, therefore, which the reclaimer John Gilmour undertook to pay, and did pay, to the creditors, neither was nor could have been calculated on any reversion from old Mr Gilmour's trust estate, and so the foundation for an implied understanding that John Gilmour as the party who undertook to pay the composition, was to have the exclusive right to any reversion that might possibly, although very improbably, arise from that estate, appears to me to be wholly awanting. Nor can I find anything in Mr Balderston's award and the relative agreement tending to lead to a different conclusion. These writings contain nothing expressly to the effect that the reversion, if any, that might arise from old Mr Gilmour's trust estate was to belong to John Gilmour; and neither is there anything in them that can be founded on as implying that he was to have any such right. On the contrary, while the rights and obligations of both the brothers John and William are specifically stated in these writings, no allusion is made in them to any reversion existing, or expected, from old Mr Gilmour's trust estate. In short, the only mention at all of that trust estate is in the estimate which was laid before the creditors to induce them to accept, as they did, of a composition of 11s. per £ on their debts, and that mention was made for the purpose of showing that, in place of being calculated on as a fund of payment, it could not for that purpose be of any avail whatever. And accordingly the composition of 11s. per £ which the reclaimer John Gilmour agreed to pay, and did pay, to the creditors, was calculated on other and different assets altogether.

For these reasons, and without entering into more detail than I have now done, I am of opinion, with both your Lordships and the Lord Ordinary, that the reversion which has unexpectedly arisen from old Mr Gilmour's trust estate must be held to belong not wholly to either of the brothers John and William, but to both equally.

The remaining alternative question, whether the reversionary fund in dispute is to be divided betwixt the two brothers, after their sisters, to whom it had been assigned in security, have drawn from it the balance of their provisions, or whether the reclaimer is entitled to one-half of the fund free from any such payment to the sisters, is attended with more difficulty. In dealing with this question, it must be borne in mind that when the reference to Mr Balderston and the consequent final agreement were entered into in March 1858, the composition arrangement between William Gilmour & Co. and their creditors had been completed, and that, in terms thereof, the creditors had agreed to discharge, and did by the deed No. 204 of process, so far discharge, Gilmour & Co. and John Gilmour, William Gilmour and William

Gilmour Cuthbertson, the individual partners thereof, as such partners, and as individuals, of all debts, claims, and demands of every description, and however vouched or constituted, owing or indebted to them at and prior to the 16th of February 1858. That the sisters of the reclaimer, and his brother William, were parties to this composition arrangement, and in terms thereof received and discharged the composition, I think is made sufficiently clear by the proof and statements in the record. The reclaimer John Gilmour expressly says so in article 14 of his condescendence, and although William Gilmour, while he also states in article 13 of his condescendence that the sisters were paid the composition, qualifies this statement by saying that such payment was made to them, not in fulfilment of the composition agreement, but under "a separate arrangement," it does not appear to me that any effect can be given to this qualification. No evidence of the alleged "separate arrangement" has been produced, and having regard to the proof, and particularly to William Gilmour's own testimony, I think it impossible to avoid the conclusion that the sisters received payment of 11s. per £ of their debts, not under any separate arrangement, but in the same way as the other creditors, under and in terms of the composition contract. It is true that the composition bills granted to and accepted by the sisters have been lost, as nearly all the others have been, but that such composition bills were granted to and accepted by the sisters and afterwards duly retired, is made clear beyond all doubt by the evidence of Mr Hoey, who managed the whole matter on behalf of all concerned. He expressly says that the bills which were given to the sisters were given to them "as composition bills," and that these bills were afterwards retired.

It cannot therefore, I think, be questioned that the reclaimer John Gilmour fully implemented his part of the agreement with his brother; but, as has been already shown, it not having been any part of that agreement that his brother should assign to him his interest in the residue of his father's estate, and keeping in view that such residue had not been calculated on, either in the arrangements between the brothers or between Gilmour and Co. and its individual partners and their creditors, the fulfilment of his part of these arrangements by John Gilmour can give him no claim to his brother's share of the residue, whatever it may be, of their father's estate. So neither, for the same reason, can either John or William Gilmour be held entitled to their respective shares of such residue free from the balance due thereupon of their sisters' provisions, after crediting the composition bills. Although acceptance by and payment to the sisters of the composition bills, operated a discharge of the personal obligation of Gilmour & Co. and its partners, it had no such effect *quoad* the real security which the sisters held for payment of their provisions. That security was not taken into account either in the composition arrangement as between Gilmour & Co. and partners and their creditors, or in the arrangement among the partners *inter se*. It must therefore be held to be entirely unaffected by these arrangements; and if so, the two brothers John and William Gilmour are entitled each to a just and equal half of the unexpected reversion which has arisen from their father's trust-estate, after payment has been first made out of the sum of their sisters' preferable claims, without any relief the one as against the other in respect of such claims. This result appears to me to be in accordance with the equity of the case and the true interpretation of all the arrangements and agreements of the parties, and especially with the last article of the final agreement of March 1858, consequent on Mr Balderston's award, whereby the parties thereto, that is, John Gilmour and William Gilmour Cuthbertson, on the first part, and William Gilmour, on the second part, in consideration of the covenants therein mentioned, of which the matter now under discussion is not one, mutually and respectively discharged and acquitted each other of all claims and demands whatever.

On these grounds, I concur with your Lordships in opinion on both the questions which have been submitted to the Court for decision.

The Court pronounced the following interlocutor:—

"The Lords having heard counsel for the parties on the reclaiming-note for John Gilmour against Lord Gifford's interlocutor of 26th May 1874, Recal the said interlocutor; of new repel the claim of John Gilmour to the exclusive right to the fund *in medio;* repel the claim of William Gilmour to have relief or allowance of the amount due to Mrs Somerville, Mrs Hall, and Mrs Cuthbertson, his sisters, in the residue account, and decern; *quoad ultra* continue the cause."

Counsel for John Gilmour—Balfour and Dean of Faculty (Clark). Agents—Hamilton, Kinnear, & Beatson, W.S.

Counsel for William Gilmour — Asher and Solicitor-General (Watson). Agents—Webster & Will, S.S.C.

Thursday, October 29.

JURY TRIAL.

KING *v.* NORTH BRITISH RAILWAY COMPANY.

Jury Trial—Verdict—Contributory Fault.

A jury was empanelled to try an action of damages for a death stated to have been caused by the negligence of a railway company, who alleged contributory fault. The presiding Judge charged the jury to the effect that if they thought that the company were in fault, and negatived fault on the part of the deceased, they must find for the pursuer; if, on the other hand, they considered that the deceased had been guilty of contributory fault, the defenders were entitled to a verdict. The jury found for the pursuer—damages £50,—but in answer to a question from the Court, stated that they considered the deceased was in fault as well as the company. The Judge *refused* to record this verdict as for the pursuer, and entered it for the defenders.

Jury Trial—Verdict—Exception.

In the above circumstances, the pursuer's counsel tendered an exception.—*Held* that it was no proper subject for exception, and that the jury were bound to answer the question of contributory fault raised on the record.

Verdict entered accordingly.

This was an action at the instance of Mrs King