pursuers were under essential error when they concluded the contract, an error which the opposite party knew they laboured under, but notwithstanding dealt with them with the contrary in his mind. I quite agree with your Lordships in holding that under the circumstances restitution is the proper remedy.

There is another question as to the validity of the parole evidence which has been taken. I do not think parole evidence can be admitted to support the introduction of a new obligation. But I have no hesitation in saying that it may be used for the purpose of showing that the pursuers were labouring under essential error when the contract was completed.

LORD MURE concurred.

The following interlocutor was pronounced:—

"The Lords having heard counsel on the reclaiming note for Thomas Hart against Lord Shand's interlocutor of 5th April 1875, together with the minute of amendment for the pursuers, No. 100 of process, now allowed to be received, Recal the said interlocutor: Find that the pursuers, in concluding the contract of sale to the defender of the Cogan Street property, mentioned on record, and in granting the disposition thereof sought to be reduced, were acting under the essential error that the said subjects were burdened with a feu-duty of £9, 15s., to the effect of relieving certain other subjects belonging to the pursuers of the said feu-duty: Find that the defender throughout the negotiations for the said sale, and in concluding the contract and accepting of the said disposition, was well aware that the pursuers were acting under the essential error foresaid, and took advantage of that error to obtain from the pursuers a disposition of the said subjects without the burden of the said feu-duty: Find that in these circumstances the pursuers are entitled to reduce the said sale and disposition, and to have the subjects restored to them with the whole rents and profits thereof received by the defender since the date of his entry thereto, but on condition of repaying to the defender the price of the said subjects, with interest thereof at five per cent. since the payment thereof, and of reimbursing the defender in his whole expenditure since his term of entry on permanent additions to or improvements of the said subjects, with interest at five per cent. on the sums so expended: Appoint the defender within eight days to lodge a state with vouchers, showing the amount due to him in terms of the above findings: Find the pursuers entitled to expenses in the Outer House to the extent of four-fifths of the taxed amount thereof, and remit to the Auditor to tax the account of the said Outer House expenses, and report: Find no expenses due to either party since the date of the Lord Ordinary's interlocutor reclaimed against."

Counsel for the Pursuers—(Respondents)—Dean of Faculty—Trayner—D. Crichton. Agents—Messrs Dewar & Deas, W.S.

Counsel for the Defenders—Balfour—Vary Campbell. Agent—L. A. Grubb, L. A.

Tuesday, November 30.

SECOND DIVISION.

[Lord Mackenzie, Ordinary.
[Lord Young, Ordinary.

BEITH *v.* MACKENZIE.

Trustee—Trust-Funds—Payments to Beneficiaries—Lapse of reasonable Time—Outstanding Claims—Bona fides of Trustee.

Where a trustee or executor, after lapse of a reasonable interval and after due inquiry, paid the trust-funds to the beneficiaries thereto entitled—*held* that he was not liable to be called upon for payment of certain outstanding claims of which no one was aware, not even the creditor himself, and which had lain over for twenty-five years, until discovered and constituted by a decree of the Court of Session.

Observations (*per* Lord Gifford) on the principle of law on this point, and on the case of *Stewart* v. *Evans*, as illustrative thereof.

This was a suspension at the instance of Donald Beith, W.S., sole surviving trustee under the settlement of the late Hugh Mackenzie of Dundonnell and the now deceased Mrs Catton, against Kenneth Mackenzie of Dundonnell and Murdo Mackenzie younger of Dundonnell, as sole acting testamentary trustees of the late Murdo Mackenzie of Dundonnell. The complainer had been charged, at the instance of the respondents, to pay a sum of £3002, 6s. 1d., with interest as from a certain date. This sum was made up of *jus relictæ* payable to the respondent's mother out of the estate of their father, with whose estate the late Hugh Mackenzie intromitted. After certain litigation (*Mackenzie* v. *Mackenzie's Trs.*, 11 Macph. 681), the Lord Ordinary (MACKENZIE) on 7th January 1874, before answer, remitted the whole accounts to Mr Haldane, C.A., for audit and report. Under this order Mr Haldane, on 9th December 1874, submitted an *interim* report, in which he sought the directions of the Lord Ordinary upon the following matters:—

"*First*, Whether a sum of £2715, 17s. 10d., received by the complainer under a policy of insurance on the life of Mrs Catton, who was the daughter and residuary legatee of Hugh Mackenzie and Mr Beith's co-trustee, falls to be treated as an asset of Hugh Mackenzie's trust?

"*Second*, Whether the whole or any portion of certain payments, amounting in all to £2257, 4s. 11d., which the complainer alleges he paid to Mr and Mrs Catton on account of Mrs Catton's interest in the residue of Hugh Mackenzie's estate, are to be held to have been so paid, and if so, whether they can to any extent compete with the claim of the respondents?

"*Third*, Whether the whole or any portion of certain law expenses, amounting in all to £2312, 1s., paid by the complainer, and which he alleges were paid by him in the *bona fide* belief that they formed proper charges on Hugh Mackenzie's trust, are to be dealt with as such, and if so, whether the complainer's claim for all or any portion of these payments is preferable to the claim of the respondents?

"*Fourth*, Whether the whole or any portion of certain sums of interest, amounting in all to

£410, 9s. 11d., paid by the complainer, and which he alleges were paid by him in the *bona fide* belief that they formed proper charges on Hugh Mackenzie's trust, are to be so dealt with, and if so, whether the complainer's claim for all or any portion of these sums is preferable to the claim of the respondents?

"*Fifth*, Whether the whole or any portion of certain miscellaneous payments, amounting in all to £565, 19s. 5d., paid by the complainer, and which he alleges were paid by him in the *bona fide* belief that they formed proper charges on Hugh Mackenzie's trust, are to be so dealt with, and if so, whether the complainer's claim for all or any portion of these sums is preferable to the claim of the respondents?"

The first of these points was given up by the trustees of Murdo Mackenzie, who abandoned their claim to this fund. But on the other points, after discussion, the Lord Ordinary (YOUNG) found for the suspender, in accordance with the views suggested by the reporter, and on 20th May 1875 pronounced an interlocutor finding "that the complainer, as trustee acting under the settlement of the deceased Hugh Mackenzie of Dundonnell, is not in possession of any trust-estate to answer the debt charged for, and that there are no grounds, by reason of improper payments by him or otherwise, for subjecting him in personal liability. To this interlocutor was appended the following:

"*Note.*—The charger's counsel abandoned the contention that the proceeds of the policy on Mrs Catton's life formed part of the trust-estate, and the question in the case as debated was, whether the payment which the complainer undoubtedly made, and for which he takes credit in his account, are to any, and what, extent objectionable at their instance, as improperly made to their prejudice? According to the view presented by the accountant, and in which I concur, the balance, with reference to which the charger's objections are to be considered, is £1963, 18s. 8d., so that if the payments objected to shall to that amount be sustained, the case must be decided on the footing that the estate has been properly exhausted so far as the chargers are concerned. Beyond this sum the only question regards the balance due to the complainer himself, and in this the chargers have no interest.

"The chief objection relates to the expenses which the complainer disbursed with reference to the litigation regarding the validity of the Dundonnell entail. The chargers object to these, on the ground that it was no purpose of the trust to try the validity of the entail. The answer, which I think is satisfactory, is that Mrs Catton, who was the sole beneficiary in the trust, was entitled to try it, and to have the expense paid out of her estate in the complainer's hands, and that the payments which he made must be sustained as properly made to or on account of the sole beneficiary. It was of course contended that a trustee who prematurely pays away the estate to the beneficiary before satisfying creditors, or without retaining sufficient for the purpose, does so at his own risk. But if, after the lapse of a reasonable time for creditors to come forward, all known and admitted debts, and all reasonably anticipated claims by creditors, are paid or provided for, a trustee is, it was I think rightly contended, in safety to pay to the proper beneficiary, or to make disbursements on her account and at her request, and will not be liable to a creditor who has, either through negligence or ignorance, omitted to make a claim which the trustee had no reason to anticipate. I agree with the complainer that this is the position of the chargers here, and think it unnecessary to advert in detail to the facts, and especially the dates, which are all set forth on record, and admitted, and which lead me to this opinion. The chargers found on the fact that there were other unsatisfied debts besides theirs when the payments objected to were made. But these were in a different category, as being known and admitted or made the subject of claim and so anticipated, and the trustee has met them accordingly, as he no doubt consciously and deliberately undertook to do, according to his legal obligation, when he paid away the estate, whether he retained sufficient funds for the purpose or not; but I cannot, with the opinion which I entertain, extend his liability to a claim which, after the lapse of a reasonable and indeed very long time, was not put forward, was not anticipated by him or any one, and was in truth unknown to the creditors themselves.

"I think it clear that all the payments objected to were made in good faith to or on account of the proper beneficiary, and that none of them are of a character to subject the complainer in personal liability to the chargers as for payments improperly made in diminution of the trust-estate to their prejudice. The whole case was fully debated on the interim report, and having formed the opinion which I have expressed, on the materials and views there presented, I find it unnecessary to order a further report or to prolong the litigation."

Against this interlocutor the trustees of Murdo Mackenzie reclaimed.

Authority quoted—*Stewart* v. *Evans*, 9 Macph. 810.

At advising—

LORD GIFFORD—This case involves a good many matters of detail, some of which raise questions of considerable difficulty; but the great and the main question in dispute between the parties is whether the suspender, now the sole surviving and acting trustee of the late Hugh Mackenzie, shall be held to have trust-funds in his hands available for the payment of the debt due to the chargers by the late Hugh Mackenzie, the truster, and by his trust-estate and representatives. The suspender pleads that he has no trust-funds in his hands available for payment of the chargers' debt, and that he has incurred no personal responsibility therefor, having in *bona fide*, and before any notice of or any knowledge of the chargers' claim, paid away the whole balance of the trust-funds to the proper beneficiaries entitled thereto.

I think it is quite fixed in law, and the rule is in entire conformity with the plainest equity, that a trustee or truster and executor, after reasonable time has elapsed and after reasonable inquiry has been made, is entitled to pay, and is in safety to pay away, the free trust or executry funds in his hands, either to legatees for pecuniary or specific legacies, or to residuary legatees, or ultimate beneficiaries, provided he does so in *bona fide* and without knowledge that there are outstanding claims due by the estate, and that he will

not be liable in repayment or in double payment to creditors whose claims were not intimated and not known at the time when such *bona fide* payment was made. The case of *Stewart* v. *Evans*, 9th June 1871, 9 Macph. 810, is a strong example of the application of this rule, for there the trustee was held free and justified in having parted with the estate although he knew of the claim, because he believed it to be effectually discharged by a deed which, however, was afterwards found to be null in law. It seems to follow *a fortiori* that the trustee would have been free if he had never known of the claim at all. The principle is recognised in other cases, and indeed on no other footing would a trustee ever be safe to wind up a trust and part with the trust-funds until perhaps the lapse of forty years—the long prescription. After six months, and in a question with creditors, the trustee or executor may pay in *bona fide primo veniente*, that is, he may pay off in full the creditors who have appeared, without being answerable to creditors who may afterwards turn up; and so after six months, and after due and reasonable inquiry, he will be quite in safety to pay the free residue to legatees or beneficiaries, and if after that creditors for the first time come forward, they must look for payment not to the trustee who has honestly and in good faith handed over the funds to the beneficiaries, but only to the beneficiaries or legatees who have actually received the funds themselves.

It seems to me there can be no doubt about this principle, and the only difficulty in the present case relates to the application of the principle to the circumstances which have here occurred. In short, the questions of difficulty in the present case are not so much questions of law as questions of fact, although these questions of fact may in their turn and in their details involve more or less difficult rules or presumptions of law.

It seems to be clear in point of fact—(*First*) That the respondents in this action are the just and lawful creditors of the late Hugh Mackenzie of Dundonnell, and of his trust-estate, upon which trust-estate the suspender Mr Beith is now the sole surviving and acting trustee. The respondent's debt is constituted by decree of this Court, dated 2d July 1873, and it constitutes a debt in the respondent's favour of upwards of £3000. If there are free trust-funds of the late Hugh Mackenzie in the hands of Mr Beith as his trustee, then beyond all question these free funds must be applied in payment of the respondent's debt so far as they will go. (*Second*) I think it is proved in point of fact that the debt claimed by the respondents was not intimated to the trustee Mr Beith, and was not known or suspected by him sooner than 4th July 1871, when its existence or possible existence was suggested in certain proceedings before the accountant under a judicial remit relative to other questions affecting the trust-estate. Down to the date in question, 4th July 1871, neither Mr Beith nor any one else—not even the creditors, the respondents, themselves—knew of the claim, or had the slightest suspicion of its existence. The claim had lain over for more than twenty-five years, and nobody, not even those in right of it, had any grounds for believing that such a claim existed.

Now, with these admitted facts, the points in dispute are—(1) Had Mr Beith, as Hugh Mackenzie's trustee, trust-funds of the late Hugh Mackenzie in his hands at 4th July 1871, and how much, or had he previous to that date paid away the trust funds to or for behoof of Mrs Catton, the residuary legatee and the sole beneficiary under Hugh Mackenzie's trust-deed; and (2) supposing that Mr Beith has previous to 4th July 1871 made payments from the trust-estate to or for behoof of Mrs Catton, did he do so in *bona fide* and in circumstances which free him from all responsibility to the present respondents as onerous creditors of the late Hugh Mackenzie, although from peculiar circumstances they did not know that they were creditors till after 4th July 1871.

Now, on these two disputed questions of fact there has been a great deal of inquiry, and we have heard a good deal of ingenious argument. The questions involve a good many points of detail; indeed the first question—I mean the state of the payments—is really a question of accounting, upon which we have from the accountant an interim report.

The accounting with Mr Beith is rendered difficult, and in some respects perplexing, from the circumstances that Mr Beith, or rather his firm of Murray, Beith, & Murray, acted as law agents and cashiers not only for Hugh Mackenzie's trustees, of whom Mr Beith is now sole survivor, but also for the marriage-contract trustees of Mr and Mrs Catton, and for Mr and Mrs Catton as individuals. Mrs Catton was the daughter and residuary legatee of Hugh Mackenzie.

Only one cash account was kept by Messrs Murray, Beith, & Murray for all these parties, that is, for Hugh Mackenzie's trustees, for Mr and Mrs Catton's marriage-contract trustees, and for Mr and Mrs Catton as individuals, and it contains entries of the whole cash transactions relating to all these different parties. It is opened in the name of "A. R. Catton, Esq. and Mrs Catton," and it continues throughout under the same heading. The explanation of this is that Messrs Murray, Beith, & Murray were originally employed by Mr and Mrs Catton as individuals, and when they afterwards became agents for the marriage-contract trustees and for the trustees of Hugh Mackenzie, no new cash account was opened, but all payments and receipts on account of any of the trusts or parties were entered indiscriminately, in the order of their dates, in the general account which stood in name of Mr and Mrs Catton. Still farther, the entries are made for the most part in general and indefinite terms, so that it does not appear on the face of the entries, or of most of them, to which account they belong. In order to ascertain this, the nature of each entry must be ascertained by a reference to the vouchers by which it is instructed, so that if separate accounts are now to be made up, it really involves an inquiry into the nature of each receipt and of each payment.

But farther still, a very large number of the entries, particularly the entries of payments, are indefinite not only on the face of the account, but also on the face of the vouchers, that is, the vouchers also are indefinite, and it cannot be discovered from them from what source or on what account the payments were made. In particular, this is the case with the whole or almost the whole of the very large payments made by Messrs Murray, Beith & Murray to or for behoof of Mr and Mrs Catton. These payments, including law accounts incurred to Messrs Murray, Beith &

Murray, amount to upwards of £4000, and it is really upon them that the whole question turns.

Mrs Catton (for whom her husband acted throughout) was not only sole beneficiary and residuary legatee under Hugh Mackenzie's trust, but was also the beneficiary under the marriage contract between her and Mr Catton. She also, as an individual, took out a policy upon her own life for £3000, upon the security of which policy, and on certain personal security, a cash-credit account was opened with the Commercial Bank, and upon this credit large sums were drawn. Mrs Catton died on 9th June 1871, when the sum in the policy became available, and the balance was ultimately recovered by Messrs Murray, Beith, & Murray. From time to time Messrs Murray, Beith, & Murray made indefinite payments to Mr and Mrs Catton, amounting, previous to 4th July 1871, when the chargers' claim became known, to £2257, 3s. 11d.; and the question is, from what funds shall these payments be held to have been made. On the face of the payments, they are indefinite and they may have been made to Mrs Catton or her husband, either as individuals, as beneficiaries under Hugh Mackenzie's trust, or as beneficiaries under the marriage-contract, or in two or more of these characters combined. It is not necessary to distinguish between Mr and Mrs Catton as individuals. Mr Catton acted throughout for his wife. On her death he became her sole representative and universal disponee. He represented his wife, and payments to him fall to be regarded as in the same position with payments to Mrs Catton herself.

Now in reference to all these indefinite payments, and to other payments in a similar position, which appear in the combined or general current account, the suspender Mr Beith, after the present question arose, claimed right to remodel the accounts and to impute these indefinite payments as payments out of Hugh Mackenzie's trust-estate none of them or few of them being admitted to be payments out of the marriage-contract trust-funds or payments on the individual credit of Mr and Mrs Catton. In this way, in the account of charge and discharge now founded on by Mr Beith he shows a very large balance—upwards of £3000—due by Hugh Mackenzie's trust, while, on the other hand, there is a sum nearly of the same amount due by the firm to the marriage-contract trustees.

Now, I am of opinion that no such remodelling of the accounts is now permissible. The suspender cannot now impute payments which at the time were indefinite to one account more than to another. These indefinite payments must now be imputed, and their incidence and legal effect must be determined in terms of law and in conformity with legal rules, and not according to the will or choice of the complainer or his firm. In particular, I am of opinion that the suspender cannot now be allowed to say—I made these indefinite payments to Mr and Mrs Catton solely as beneficiaries under Hugh Mackenzie's trust, while at the same time I was retaining and accumulating for their behoof the whole income which was arising under the marriage contract trust, to which income Mrs Catton was undoubtedly from time to time entitled. This is the practical result of the suspender's claim to remodel the accounts, and I think the claim and its results are quite inadmissible.

On the other hand, it seems to me equally clear that the respondents are not entitled to insist that these indefinite payments must have been made solely on account of the marriage-contract funds, the result of which would be to make Messrs Murray, Beith & Murray advance, as on marriage-contract trust-account, sums greatly larger than they ever received on that account, and this in order to make them debtors under Hugh Mackenzie's trust.

The equitable rule seems to be that where a cashier or trustee holds two different funds for the same beneficiary and makes indefinite payments to the beneficiary without fixing at the time from which fund the payments come, then these indefinite payments must, whenever occasion arises, be equitably apportioned between the two trusts, if the trustee or cashier held funds belonging to both, or must be held to have been made from that fund or trust of which the cashier or trustee at the time had a balance in his hands, and not from any other trust of which at the time the cashier or trustee had no balance in his hands from which the payment could be made. In short, the trustee or cashier shall not be held to advance or lend to the beneficiary so long as he has any funds in his hands belonging to the beneficiary and from which the payment might be made. In other words, a trustee intromitting with two funds, and making indefinite payments to the common beneficiary of both, shall always be held to make these payments from funds in his hands, and not in expectation of getting funds on another account which he has not yet received.

For example, if Messrs Murray, Beith & Murray paid at a particular date, say £100, to Mr and Mrs Catton, and if at the time they had Hugh Mackenzie's trust-funds in their hands to an extent equal to or exceeding that amount, and had no marriage-contract trust-funds in their hands, then the payment must be held to have been made out of Hugh Mackenzie's trust-funds, being the only fund available, and not to have been made as a loan in advance, as on account of the marriage-contract trust, of which trust there were no funds then available.

Now, it appears to me that the application of this principle will really solve the whole questions now in dispute, for I think it sufficently appears that the payments made by Messrs Murray, Beith & Murray to Mr and Mrs Catton prior to 4th July 1871, and the accounts incurred by Mr and Mrs Catton prior to that date, far more than exhaust the whole available funds then received by Messrs Murray, Beith & Murray, both on account of Hugh Mackenzie's trust and of the marriage-contract trustees.

It seems to me to be quite clear that if at 4th July 1871 Messrs Murray, Beith & Murray were in advance to Mr and Mrs Catton, and had no funds at all in their hands either belonging to Hugh Mackenzie's estate or to the marriage-contract trust, or to any other estate whatever, in which Mr and Mrs Catton were interested, then the payments to Mr and Mrs Catton must be held to have been made out of Hugh Mackenzie's trust-estate in so far as they cannot be imputed to any of the other funds in the agents' hands, even supposing that indefinite payments were to be imputed first to the marriage-contract income, or to any other separate or individual fund; the moment these are exhausted Hugh Mackenzie's

trust-estate becomes the only fund from which the payments could be made.

I think we have sufficient materials before us to show that at 4th July 1871 every fund, including the whole of Hugh Mackenzie's trust-estate then in the hands of Messrs Murray, Beith & Murray, had been paid away and exhausted.

No doubt we have only an interim report from the accountant, to whom the Lord Ordinary remitted the case, but that interim report is very full and exhaustive, and sufficiently brings out the facts in the accounting to enable us quite safely at once to apply the law. I think it unnecessary to send the case back to the accountant with directions in point of law, when we ourselves, taking the figures from the accountant's report, can at once apply the law and finally dispose of the case. I think therefore that the Lord Ordinary has quite rightly held the interim report to be in substance a final report, and as that report is not objected to by any party on any ground whatever, it may rightly be made the basis of a final judgment.

Now, it appears from the accountant's report and from the accounts of Messrs Murray, Beith, & Murray, that even if effect were given to all the objections stated by the chargers, there would be as at 4th July 1871 a balance due by Murray, Beith & Murray of £1963, 18s. 8d., with interest. The chargers admitted that in no possible view could they demand more than this sum. This sum, however, the chargers now maintain must be held to be in the hands of the suspender Mr Beith, or his firm, and this sum accordingly they now claim payment of to account of their decree.

This balance of £1963, 18s. 8d., however, is only brought out against Messrs Murray, Beith & Murray by disallowing and striking out of their account all payments made to Mr and Mrs Catton, amounting, as reported by the accountant, to £2257, 4s. 11d. This sum represents advances to Mr and Mrs Catton, or for their behoof, after exhausting all other available funds. From this sum of £2257, 4s. 11d., however, fall I think to be deducted the whole rents of Mungusdale and other marriage-contract funds available, and it is only after exhausting these other funds that these indefinite payments are to be debited or held as paid from Hugh Mackenzie's trust. This reduces these payments as charges on Hugh Mackenzie's trust to £1020, 19s. 5d., as shewn in the accountant's report.

Now, I am of opinion, that provided only these payments to Mr and Mrs Catton were made in good faith (to which question I shall come immediately), the chargers are not entitled to strike them out of Messrs Murray, Beith & Murray's account, or to refuse them credit therefor. The payments were undoubtedly made in point of fact, they are sufficiently vouched, and there is really no dispute that the money was disbursed by Murray, Beith & Murray. I think they must be held to have been made out of Hugh Mackenzie's trust-estate so far as it would go, for there was no other fund from which these payments could have been made, and therefore, so far as the mere matter of fact is concerned, I am driven to hold —I must hold—that on 4th July 1871 Mr Beith and his firm had paid to Mrs Catton, or her husband for her, the above sum of £1020, 19s. 5d.

The next sums in dispute are the law expenses, either paid for or incurred by Mr and Mrs Catton. These amount to a very large sum, and it is only by leaving them out of view and refusing credit for them that the chargers can bring out a balance as due by Mr Beith or his firm. The amount of these law expenses which it is said must be disallowed is, as reported by the accountant, £2312, 1s. Parties are, however, at issue about this amount, the chargers alleging that part of this large sum was incurred or paid after 4th July 1871, and this to some extent seems to be true. I understood the chargers to say that only £1200 were incurred prior to 4th July 1871, whereas the suspender maintains that at least £1500 was incurred before that date.

In the view I take of the case it is not necessary to adjust more precisely this dispute. It is only necessary to exhaust Hugh Mackenzie's estate in the suspender's hands, and there is a very large margin whichever sum be taken as the true amount of the law expenses.

The Lord Ordinary's judgment is rested upon the law expenses alone, which he held sufficient to exhaust the funds of Hugh Mackenzie's estate in the complainer's hands. Looking to the dispute as to the amount of these expenses however, and to the complainer's admission that a considerable part was incurred after 4th July 1871, these law expenses will not suffice as the sole ground of judgment, although they form a very large element therein.

I am of opinion that the law expenses in question, at least the greater part of them, cannot be held as proper trust expenses incurred in the execution of Hugh Mackenzie's trust. Excepting as to one or two of the smaller litigations, Hugh Mackenzie's trustees were not the proper or the actual litigants at all. For example, it was not Hugh Mackenzie's trustees who sought to set aside the Dundonnell entail; it was Mr and Mrs Catton alone, as individuals, and for their own rights. Accordingly it was not Hugh Mackenzie's trustees who were found liable in the expenses to the heir of entail who was successful; the decree went out against Mr and Mrs Catton alone. In paying these expenses therefore, Messrs Murray, Beith & Murray were not paying a trust debt of Hugh Mackenzie, but merely the individual debt of Mr and Mrs Catton.

But although the law expenses (excepting a comparatively small portion thereof which were proper trust expenses) were merely the individual debts of Mr and Mrs Catton, I am of opinion that they are really in the same position, so far as the present question is concerned, with the payments made in cash by Mr Beith or his firm to Mr and Mrs Catton themselves. The whole of these law expenses were incurred by Mr and Mrs Catton; they were personally liable therefor, and bound to pay the same, and if they had funds in the hands of Messrs Murray, Beith & Murray, said funds were applicable and might be rightly applied in paying said expenses. The expenses were incurred on the faith of Mr and Mrs Catton's beneficial interest in the trust, and so far as incurred prior to 4th July 1871 the trust-fund might properly be debited with their amount. A creditor of Mr and Mrs Catton could never, by arresting in Murray, Beith, & Murray's hands, have prevented them from retaining from the funds in their hands payment of their own accounts. I view

the law expenses therefore as really in the same position with the cash advances, and taking the lowest sum admittedly incurred before 4th July 1871, £1200, this sum of £1200 must be added to the £1020, 19s. 5d.—those two sums of course more than extinguishing the £1963, 18s. 8d. alleged to be in the suspender's hands.

The next disputed item is interest on the debt of £3000 affecting the fee-simple lands conveyed to the marriage-contract trustees. Now, this debt of £3000 the truster Hugh Mackenzie had bound himself in the marriage-contract to pay off within six months of his death. He did not do so, but the debt and interest were really a truster's debt, and so far as Messrs Murray, Beith & Murray paid the interest due before 4th July 1871, I think it clear that that was a payment on account of the trust for which in the present question they are entitled to credit.

There still remain various miscellaneous payments for which the suspender claims credit. These are referred to in the accountant's report, page 20, and in the appendix E. It is unnecessary to go into the details of these payments. I think, in the most unfavourable view of Mr Beith, he is entitled to credit for some of these payments, probably to an extent exceeding £100; but, as apart altogether from these payments the balance alleged to be in his hands is far more than exhausted, no further inquiry is necessary.

I hold it proved therefore by the accountant's report that at 4th July 1871 there were in point of fact no funds whatever in the hands of Mr Beith or his firm, excepting the unsold furniture and plate.

The next question is, Were the trust funds thus parted with and paid away by Mr Beith so paid away justifiably and in *bona fide*, or was he bound to have retained them so as now to be available for the debt due to the respondents?

Upon this question parties have not offered any proof of facts and circumstances other than the admissions on record and the correspondence and documents in process, and both parties asked a judgment on the case as it stands, and I have come to be of opinion that the payments made by Mr Beith and his firm were not only made in *bona fide*, but were made in circumstances which justified the payments, or at all events in circumstances which disentitle the present chargers to object thereto. The *bona fides* of Mr Beith and of his firm, that is, the good faith in which they acted throughout, using the words good faith in their common meaning, was not seriously impugned by the chargers. The charger's case was really that Mr Beith had acted rashly and precipitately in handing over the funds to the residuary legatees of Hugh Mackenzie before making sure that all Hugh Mackenzie's debts were paid and discharged. The chargers urged with much force that a trustee, the first purpose of whose trust is the payment of the truster's debts, is bound to take great care that all these debts are paid or provided for before giving away any of the funds to gratuitous legatees or beneficiaries, in whose hands the funds may be spent or lost, and thus the rights of creditors of the truster defeated.

But the real question always is, when is a trustee in safety to hold that there are no debts outstanding? and when is he in safety, if no creditors come forward, to pay away the funds to the beneficiaries? and to some extent this may be a question of circumstances.

In the present case, and limiting myself to the question with the present chargers, I think Mr Beith was entitled prior to 4th July 1871 to pay away what appeared to him to be free residue to the residuary legatees.

The truster died on 20th July 1869, and by the common law of Scotland all creditors of the deceased were bound within six months after his death to intimate their claims with a view to payment. These six months are allowed not only as the time within which creditors may come forward, but as the time given to the executor to make reasonable inquiry into the deceased's affairs, to realise his estate or ascertain its amount, and whether the deceased died solvent or not.

Accordingly the trustee cannot be compelled to pay to any creditor or legatee before the lapse of six months; and, on the other hand, the trustee is entitled and is bound to pay *primo veniente*, as it is called, that is, to the creditors who first come forward, without waiting for other and unknown creditors, who have not appeared. In like manner, if no creditors at all have appeared, and if none are known, a trustee may safely wind up and distribute the estate among the legatees or beneficiaries, and after this has been done in *bona fide*, that is, without any design to defeat the rights of anybody, creditors who have been negligent or remiss must thereafter make their claim, not against the trustee who is denuded, but against the legatees or beneficiaries who are *lucrati* by the succession. I think it was not seriously disputed that in the ordinary case this is the rule of law.

I am of opinion that this rule is applicable to the case before us. Two years elapsed from Hugh Mackenzie's death before the chargers' claim was made, or rather before it occurred to anybody that the claim existed. It was found out not by the chargers themselves, but by the accountant in the course of making a separate investigation. It is not pretended that Mr Beith or his firm had, or could have, the sightest idea or the slightest suspicion, prior to 4th July 1871, that the chargers' claim existed. If there had been nothing in the case but this, the chargers could hardly have maintained that Mr Beith was bound to keep the whole trust-funds in his hands for more than two years on the mere chance that possibly some unknown, unsuspected, and undiscoverable debt might possibly emerge. How long is this state of matters to continue, and how long are beneficiaries or legatees to wait for payment of funds actually collected and ready for distribution? The only answer that can be given is six months, and creditors not discovered, or who do not appear within that time must take their chance of the free funds being in *bona fide* paid away to the beneficiaries or the next-of-kin.

But the specialty in the present case on which the respondents rely is, that before Mr Beith became trustee he was warned by Messrs Skene & Peacock, the agents for the former trustees, that there were large claims which might come against the estate to such an extent that possibly the estate might turn out insolvent, and the claims feared were specially mentioned. The present claim of the respondent, however, was not one of those apprehended, and was not known

then, either to Messrs Skene & Peacock or to anyone else.

Now, I am of opinion that the present respondents are not entitled to take any benefit from the fact that in November 1869 Messrs Skene & Peacock told them of certain possible claims against the estate, the present claim not being one of them. Mr Beith after inquiry was entitled to take his chance of these claims, none of which have as yet been constituted against the estate, but the mere circumstance that certain creditors have intimated claims will not avail to other creditors who have failed to come forward until all the funds have been paid away. It is impossible to maintain that no part of an estate can be distributed to the beneficiaries so long as any possible claim—it may be a disputed claim—stands over unsettled.

The result is that, in my opinion, the interlocutor of the Lord Ordinary is well founded, although the ground on which the Lord Ordinary has proceeded is too narrow. Indeed it was admitted that the law expenses, to which alone the Lord Ordinary has confined himself, are not sufficient to exhaust the admitted funds.

Provision must also be made for the unsold furniture and plate, or the price thereof, and this will involve an alteration to that extent on the Lord Ordinary's interlocutor,

The other Judges concurred.

The Court pronounced the following interlocutor:—

"Find that the only part of the trust-estate now or at 4th July 1871 remaining in the hands of the complainer is the plate mentioned in the 16th article of the statement of facts for the complainer: Find that the complainer is bound to realise this plate and pay over the amount received therefor to the reclaimers, so far as necessary for payment of their debt, and ordain him forthwith to take steps for that purpose: *Quoad ultra* adhere to the interlocutor of the Lord Ordinary: Find the reclaimers liable in additional expenses, and remit to the Auditor to tax the same and to report, and decern."

Counsel for Complainer (Respondent)—Balfour—Moody Stuart. Agents—Murray, Beith, & Murray, W.S.

Counsel for Respondent (Reclaimer)—Asher—Hunter. Agents—Skene, Webster, & Peacock, W.S.

HIGH COURT OF JUSTICIARY.

Friday, December 3.

JOSEPH DAWSON WORMALD, PETITIONER.

(Present—Lord Justice-General, Lord Justice-Clerk, Lords Deas, Ardmillan, Young, and Mure.)

Crime — Liberation — Bail—Breach of Trust and Embezzlement—Theft.

A prisoner was committed on the charge of (1) falsehood, fraud, and wilful imposition, and (2) breach of trust and embezzlement, or, alternatively, with theft. A petition for admission to bail was presented, on the ground that the narrative of the petition on which the prisoner was committed was not relevant to support a charge of theft, that the other crimes charged were bailable, and that the circumstances warranted the equitable interference of the Court. *Held* that the Court could not in such an application decide the question of relevancy, and that the prisoner's circumstances were matter for the Crown.

This was an application to the Court to admit to bail Joseph Dawson Wormald, W.S., Edinburgh, who had been committed to prison on the charges (1) of falsehood, fraud, and wilful imposition, and (2) of breach of trust and embezzlement, or, alternatively, of theft. He was apprehended on the 26th November 1875, and committed on the first charge, and had then applied to the Magistrates for liberation on bail. With the consent of the Crown bail was fixed at £300, which was tendered. The Procurator-Fiscal, however, refused consent to the liberation, on the ground that two additional charges were about to be made on which he might be re-committed. On the 30th he was re-committed on the second charge, and the application for liberation on bail was renewed, and, after consultation with the Crown, refused.

The petition on which the last committal took place set forth, *inter alia*, that the prisoner had uplifted from the Bank of Scotland a sum of £404, 11s. 6d., and from the Union Bank £236, 11s. 11d., the property of Andrew Donaldson, by whom he had been employed as agent to invest these monies on heritable security, and had wickedly and feloniously stolen and taken away these sums.

In these circumstances the present petition was brought.

The petitioner argued—The giving or withholding bail was not here in the discretion of the Crown, for the charges made were bailable. The charge of theft, which was unbailable, was merely alternative to the breach of trust, and was not relevant, as no circumstances were set forth out of which theft could emerge. The circumstances of the case warranted the granting of the prayer to give the prisoner an opportunity of preparing his defence, especially as he was bankrupt.

Counsel for the Crown were not called on.

At advising—

Lord Justice-Clerk—In this case we are not now considering the question of relevancy of an indictment, but the application by the prisoner to be admitted to bail—in the first place, on the ground that the petition does not set out any circumstances out of which an offence which is not bailable can by possibility emerge; and in the second place, on an appeal to the equitable power of the Court in the circumstances of the case. Undoubtedly, if we were scanning this petition as if it were an indictment, my impression would be that the allegation in point of fact, which is very general, savours so much of breach of trust as hardly to leave much room for a charge of theft. But I do not know what the facts are, except the general allegations that at a particular time Mr Donaldson entrusted the