1862, and that if they proceeded under that Act they must assess under it, and under no other. They may have powers under both Acts, but the assessments must be laid on in conformity with the Act of which they use the powers.

The special drainage district was formed on the assumption that no burgh was to be created, and the local authority within that district, as well as for the rest of the parish, was the parochial board. It was thus a district within the parish, and formed a proper parochial arrangement when no burgh existed. But the creation of the burgh made a material alteration, and what was suitable for the parish might have been unsuitable for the burgh. Whether the drainage district could continue to exist after the creation of the burgh I do not stop to inquire. But if it did, I do not think that the Police Commissioners were bound to adopt it, and to proceed under the Act of 1867, if they thought that such a course would not be for the advantage of the burgh. The matter was one for their judgment, and for theirs alone, subject to such appeals as are given to any ratepayer under the Act of 1862.

Lord Young concurred.

The Lord Justice-Clerk was absent.

The Court recalled the Lord Ordinary's interlocutor, and refused the note of suspension.

Counsel for Pursuer (Respondent)—Robertson—Murray. Agents—Russell & Dunlop, C.S.
Counsel for Defenders (Reclaimers)—Moncreiff—Dickson. Agents—Maconochie & Hare, W.S.

Friday, June 9.

SECOND DIVISION.

[Lord Kinnear Ordinary.

LIQUIDATORS OF THE CALEDONIAN HERITABLE SECURITY COMPANY *v.* CURROR'S TRUSTEE.

Public Company — Director — Misapplication of Funds—Liability for Loss.

In an action for damages against the trustee on the bankrupt estate of a deceased director of a joint-stock company, the objects of which were lending money on heritable and other securities, for loss through misapplication of the company's funds,—*held* that liability for loss incurred through the failure of another company which had an open account with the first-mentioned company, similar to that of banker and customer, on which moneys were lodged on deposit-receipt and remained at call, there being no security for overdrafts, did not attach to the directors where there was not sufficient evidence to show that they were cognisant of the existence and continuance of the irregular account, or that this ignorance arose from a failure in their duty.

The Caledonian Heritable Security Company (Limited) was formed in March 1872, and was incorporated under "The Companies Acts 1862 and 1867," as a company limited by shares, on 27th March 1872, and had its registered office in Edinburgh. The objects for which the company was formed, as set forth in the memorandum of association, were as follows:—"To advance or lend money on security of all kinds of heritable property, or for the purpose of building, draining, enclosing, or otherwise improving the same: To make advances for the execution of works undertaken in virtue of powers conferred by any public or local Act of Parliament, on the securities thereby authorised; and also on the security of annuities and on other assignable properties, and on or for the purchase of reversionary interests heritably secured: To receive money by way of loan, by cash-credit, debenture, deposit, or otherwise, and the doing of all such other things as are incidental or conducive to the attainment of the above objects."

The deceased Adam Curror of The Lee was a subscriber of the memorandum of association, was one of the first directors named in the articles of association, and was elected a director at the first general meeting of the company, when Richard Wilson, C.A., was at the same time appointed manager. Mr Curror continued to be a director till December 1878, when he became disqualified by his sequestration in bankruptcy. The respondent, Thomas Whitson, C.A., was appointed his trustee. Mr Curror died in February 1879. The company carried on business till July 1880, when it was resolved at an extraordinary general meeting held on the 13th of that month, that the company, by reason of its liabilities, should be put into voluntary liquidation. The pursuer, Peter Couper, C.A., was appointed liquidator, and the liquidation was brought under the supervision of the Court of Session in December following.

In or about November 1874, another company, called the Edinburgh and Glasgow Heritable Company (Limited), was established, and was incorporated under the Companies Acts of 1862 and 1867. The objects for which this company was formed were similar to those of the Caledonian Company. Certain of the directors of the Caledonian Company were also directors of the Edinburgh and Glasgow Heritable Company, and with the consent of the directors of the former company, the said Richard Wilson was also appointed manager of the Edinburgh and Glasgow Heritable Company. The Edinburgh and Glasgow Heritable Company carried on business till May 1880, when it also went into voluntary liquidation.

In September 1881 a claim was made by Mr Couper as liquidator (or more accurately, by another party who was then in the position of his assignee, but who afterwards re-assigned to Mr Couper) for a ranking on the sequestrated estate of Mr Curror for the sum of £26,500, being the amount of funds of the Caledonian Company alleged to have been lost through the misapplications of the directorate. The claims against the surviving directors had been previously compromised. The present action was an appeal against the deliverance of the trustee rejecting the claim. The grounds of the claim and the modes in which liability was sought to be fixed on Mr Curror as a director, as disclosed on proof, are detailed in the opinions of the Lord Ordinary and Lord Young.

The respondent pleaded breach of trust on the part of Mr Curror along with the other directors, inferring liability of each *in solidum*.

The Lord Ordinary refused the appeal and

affirmed the deliverance of the trustee, adding the following note—"The claim is founded upon an alleged breach of trust on the part of the late Mr Curror, as a director of the Caledonian Heritable Security Company. It is said that in breach of his duty as a director he employed the assets of the company, or sanctioned their being employed, in a manner and for purposes that were not warranted by the constitution, by making cash advances without security to the Edinburgh and Glasgow Heritable Company. There is no question as to the course of dealing between the companies. In November 1874 the Edinburgh and Glasgow Company began to lodge moneys with the Caledonian Company on deposit-receipt at call, and to draw out moneys against the moneys so lodged. By Whitsunday 1875 the account was overdrawn to the extent of about £1500; and this system of dealing continued during the whole period of Mr Curror's directorate,—until at the date of his sequestration, when he ceased to be a director, there was a balance due by the Edinburgh and Glasgow Company to the Caledonian Company, which the liquidator states as amounting, with interest, to £22,751, 5s. 10d. The respondent does not admit the amount of the balance; but in other respects there is no controversy as to the facts stated.

"It does not seem doubtful that this mode of applying the Company's funds was, as the appellant maintains, in violation of the constitution, or that directors by whom the funds were so misapplied, or who knew of and sanctioned the misapplication must be jointly and severally responsible for the loss thence arising. On the other hand, a director, who was in no way implicated in those transactions either by actively taking part in them, or even by knowing of them, and abstaining from preventing them, cannot be made personally responsible unless it can be shown that his ignorance was equivalent to a breach of trust; and I am of opinion that the appellant has failed to prove either that Mr Curror was actually cognisant of the transactions between the companies, or that if he did not know of them, his ignorance was owing to neglect of duty.

"It is admitted that there was no written authority to make the advances, and that no reference to them is to be found in the minutes. But Mr Wilson, who was manager of both companies, says that he had the verbal authority of the directors for what was done; and there is no question that he had the sanction at least of some of the directors. But he says that the subject was often talked of at meetings, and he asserts very positively that all the directors, and in particular that Mr Curror, must have known of the advances at the time they were made. But it is impossible to charge a deceased director with breach of trust upon such general allegations as to assert he must have known, especially when other directors (Mr Neilson and Mr Bryson), who had the same means of knowledge as he, depone that they knew nothing of the matter. It is more important to consider the specific means of knowledge which Mr Curror is said to have possessed.

"(1) It is said that the matter was discussed at the meetings of the directors. But there is no evidence of its having been discussed at any particular meeting at which Mr Curror is proved to have been present, and it seems to be clear from the evidence of Mr Bryson and Mr Neilson that he might have been present at many meetings without his attention having been called to it. Mr Bryson says that he attended the meetings regularly and took part in the business; that he never heard of the moneys being placed with the Edinburgh and Glasgow Company until after the Caledonian Company was put in liquidation; that the subject of advances by the one company to the other was never mentioned at any meeting that he recollects of; that he was never told by the manager of these advances; and that he never thought there was any lending of money between the two companies. Mr Neilson gives similar testimony.

"(2) Before the annual balance at the 31st of December in each year, it was the practice to lay upon the table, before the books had been remitted to the auditor, trial balance-sheets, consisting of the balances of every account in the ledger. The trial balance-sheets for the years 1875-6-7 have been printed, and in each case there appears on the debit side the sum then standing at the credit of the Caledonian Company with the Edinburgh and Glasgow Company. But it is not proved that those trial balance-sheets were examined by Mr Curror; and it does not appear that he was under a duty to examine them, so as to make it reasonable to impute to him a knowledge of their contents in the absence of evidence to that effect.

"(3) In the balance-sheets submitted with the report to the shareholders, the loans of the company are stated among the assets, but they are stated generally as 'loans on heritable securities,' or in 1878, 'on heritable securities, &c.' There is nothing to indicate that any part of these loans had been made in terms that were not warranted by the constitution.

"(4) Mr Curror was a shareholder, but not a director, of the Edinburgh and Glasgow Company, and in the reports and balance-sheets of that Company for the same years there is a statement of the amounts due at the respective dates to the Caledonian Company. But it would be altogether unreasonable to impute to every shareholder of a company knowledge of the contents of its directors' reports, upon no other evidence except the fact that such reports had been issued.

"(5) The advances were frequently made by cheque on the Caledonian Company's bank account; such cheques were signed by the manager and two of the directors; and three of these cheques have been produced, bearing the signature of Mr Curror. Two of these are for small sums, and are not payable to the Edinburgh and Glasgow Company. But the third is a cheque for £5000 in favour of that company; and it is undoubtedly a material piece of evidence tending to implicate the directors who signed it in the transaction in question. But it is not of itself conclusive. The evidence is, that on such occasions cheques were frequently presented to the director by a clerk, having been previously signed by the manager. The manager says that he 'would very likely give the clerk instructions to explain to the directors what the cheque was for.' But there is no evidence as to the nature of the explanation, if any, that was given to Mr Curror. It is possible that he might have signed in reliance on the previous signature of the manager, and it is possible that he might have obtained an

explanation which justified him in signing, and which did not disclose either the series of transactions of which this was a part, or the fact that the cheque was an advance without security.

"The appellant relies on the case of the *Joint-Stock Discount Company* v. *Brown*, L.R., 8 Eq., 381, and maintains that a director is bound to inquire and ascertain for what purposes cheques are required. But in the case of *Brown*, a director who had signed a cheque for certain moneys improperly expended, defended himself on the ground that the signature of a cheque is a mere ministerial act, that he had signed as a mere matter of form, and in complete ignorance of all the circumstances connected with it. This was held to be a bad answer, and the Vice-Chancellor points out that where a company, for its own protection against the misapplication of funds, requires that cheques shall be signed by a certain number of persons, 'that implies that every one of those persons takes care to inform himself, or if he does take care to inform himself, is willing to take risk of not doing so, of the purpose for which and the authority under which the cheque is signed.' But it cannot be assumed against Mr Curror, on no other evidence than the fact of the cheque being signed, either that he signed without inquiry as mere matter of form, or that, having inquired, he received an explanation which showed that the cheque was wanted for an improper purpose. The case of *Brown* does not appear to me an authority for saying that knowledge of the purpose for which a cheque is to be used must be imputed by a rule of law to every director who signs it; and the case of the *Land Credit Company of Ireland* v. *Lord Fermoy*, L.R., 5 Chanc. 763, is an authority to the contrary. A committee of directors had improperly purchased shares of their own company, in the names of two of their officers, and drew cheques in order to pay for the shares. These cheques were reported to a meeting of directors as having been drawn for loans, and were approved and signed. The true nature of the transaction was known to some of the directors, but one of them, who was present at only part of the meetings, but who signed the cheque, denied all knowledge of it. The Master of the Rolls held that he was equally liable with the others. But his decision was reversed upon appeal, the Lord Chancellor holding that the scheme of the executive committee had been concealed from him, and that he was justified in signing as for a loan recommended by the executive committee.

"I do not suggest that Mr Curror was induced to sign by any similar fraud. But unless it be shown that it was impossible for him to have signed the cheque under a reasonable belief that it was required for a proper purpose, it cannot be held that the mere existence of the cheque bearing his signature is conclusive of his participation in the transaction in question.

"The result is that the appellant appears to me to have failed to prove his case."

The appellant reclaimed, and argued—It is not necessary to bring home actual or presumptive knowledge to the directors. Negligence involves *culpa*, but not necessarily knowledge. A director may be ignorant and yet escape legal liability, but he must account for his ignorance. Directors when put on their inquiry as to the application of the company's funds, are bound in discharge of their duty to the shareholders to control the management, even though that should take them into what is properly the manager's department.

The respondent replied—The mere signing of a cheque is not enough *per se* to fix on the signing director the duty of having known what, if he had known, would have prevented his signing it. The facts showed that this was not a system of advances known to the directors, but one initiated and carried on by the manager, who had withheld information from the directors. If there was any failure of duty here, it was on the part of the manager, who did not disclose his system of dealing to the directors. It is not enough to say that the books show it.

Additional authorities — Buckley's Companies Acts, 3d ed., pp. 404-5; *Lees* v. *Tod and Others*, March 17, 1882, 19 Scot. Law Rep. 513; *Western Bank* v. *Baird's Trustees*, Nov. 22, 1872, 11 Macph. 96; *Cullen* v. *Thomson's Trustees*, July 25, 1862, 4 Macq. 424; *National Exchange Co.* v. *Drew & Dick*, July 27, 1860, 23 D. 1.

The Lords made avizandum, and at advising Lord Young read this opinion—This case comes before us in the form of an appeal against the deliverance of the trustee on the bankrupt estate of the late Mr Curror rejecting the claim of the appellant for a ranking, but was, I think, properly argued exactly as if it had been an action by the appellant as liquidator of the Caledonian Heritable Security Company against Mr Curror in his lifetime for money misapplied by him while a director of that company. The misapplication alleged is that of advances of money without security, and on mere open account, to the Edinburgh and Glasgow Heritable Company, between Whitsunday 1875 and December 1878, when Mr Curror became bankrupt, and ceased to be a director. The account exactly resembled an account between a banker and customer which was allowed to be overdrawn. The liquidator says of it, no doubt correctly, that "it was operated on as a current account with a fluctuating balance." It has been copied from the books of the Caledonian Company, and printed for our information, and the character and extent and endurance of it are plain enough. It was admittedly a breach of duty, and beyond the powers of the directors, or any of them, to sanction such an account—that is, so to risk the funds of the company with the administration of which they were entrusted; and it is not disputed that any director who was instrumental in making such advances, or who knew and approved or connived at their being made by others, would be personally responsible for any consequent loss. The manager says that the inducement to make them was the higher interest procured. "It was," he says, "an advantage to the Caledonian Company to put the money with the Edinburgh and Glasgow Company. If we had the money lying at the bank we probably would only get one per cent., and the company would benefit by giving the money to the Edinburgh and Glasgow Company to the amount of the difference of interest received. I think the interest received from the Edinburgh and Glasgow Company was 4½ per cent." This is an intelligible motive, but would not relieve from liability for the loss, the advances being *ultra vires*. The total amount of the advances, including in-

terest, was £185,811. They were, however, repaid to the amount of £163,693, or if the transference of £15,000 to the purchasers of St Mary's Buildings is taken account of as a repayment, then to the amount of £178,693, leaving a loss of about £22,000 in the one view, and of about £7000 in the other. According to the doctrine of appropriation of payments on current account, the payments amounting to £163,693 (taking the most unfavourable view) must be appropriated to the earlier advances, thus leaving the loss to be attributed to the later advances to the amount of £22,000, these alone being left unpaid. In the other view, only the later advances to the amount of £7000 were left unpaid. But the advances made in 1878 amounted to £32,136, £7475 thereof being advanced between June and the end of the year. On the advances prior to 1878 there was no loss (leaving out of view the transference referred to, which involves considerations special to itself), and so no liability incurred in respect of them.

Now, how were the advances in fact made? On this question the pursuer's evidence is very loose and unsatisfactory, and indeed I hardly know what his case on it is. The manager says —"If we had large surplus funds lying at the bank, we just transferred so much of them to the other company, and took it out just as we required it again. The transference was made by cheque on the bank account. The advances were not always made through the medium of the bank account. No doubt if large cheques came in payable to the Caledonian Company when the bank account was full, we might pay the money directly to the Edinburgh and Glasgow Company. I cannot instance any particular case where that was done, but I have very little doubt that would be done sometimes. At this distance of time I would not like to say whether the advances were more usually made by cheque, but that can be quite easily traced from the books." It has not in fact been traced from the books—the pursuer being satisfied no doubt that he could not thereby affect Mr Curror as instrumental or participant in or cognisant of any particular advance, except only in so far as the three cheques signed by him may be available for this purpose. This is certainly a very odd way of presenting a case for liability against an individual director. With respect to the cheques signed by Mr Curror, and particularly the earliest, which is for £5000, it is probable (we can only conjecture, there being no evidence on the subject) that the amount is included in the advance of £9530, which the account shows to have been advanced to the Edinburgh and Glasgow Company of the same date (15th November 1876), the excess of £4530 being the produce of cheques which had come in "payable to the Caledonian Company when the bank account was full." But it is unnecessary to dwell on this, for that advance was certainly repaid. The two other cheques for £100 and £50 seem to have no bearing on the case, and there is certainly no evidence to show that they have any.

But the cheque of 15th November 1876, although not available, as I think it clearly is not, to charge Mr Curror with the amount of it as money of the company misapplied and lost, is founded on as evidence to show that he was cognisant of the existence of the irregular account to the effect of making him responsible, by not having interfered to put an end to it, for subsequent advances by others in the course of it which were not repaid. I agree with the Lord Ordinary in thinking that, although such a case is possible, there is no sufficient evidence of it by this cheque or otherwise. The cheque itself is very little evidence of it indeed, although it might, no doubt, have been an item of evidence. I should myself, on this head, have attached more importance to the minute of the meeting of 28th March 1877, at which he was present, for it certainly indicates, at least to us, and with the knowledge we have, that there were these outstanding unsecured advances to the Edinburgh and Glasgow Heritable Company, to the amount of £15,000, which might well have put a zealous director to inquire concerning them. But I incline, with the Lord Ordinary, to think that this also is insufficient. For even assuming that Mr Curror was then informed that the Edinburgh and Glasgow Company had £15,000 of the Caledonian Company without security, I should be disposed to hold that he then did the best he could by taking the security then offered for it, and there being nothing to show that he was responsible for the advance to them without security then outstanding unpaid, I cannot find a satisfactory reason for holding that he is liable because of the failure of the security then taken. I think, further, that it would be reasoning too subtley in such a matter to infer from this incident a knowledge that the account was to be continued, so that because of his failure to take active measures to stop it he should be made responsible for future advances, which he is not otherwise proved to have been a party to or cognisant of.

The rule that each director of a company is liable for the money for which he signs a cheque contrary to his duty, or authorises the expenditure of contrary to his duty, is that to which the pursuer appeals, and I am of opinion with the Lord Ordinary that the evidence which he has presented to us is insufficient to subject Mr Curror to liability according to it. Had I been satisfied that Mr Curror knew of the account in question, and even tacitly sanctioned its existence and continuance, I should have been greatly disposed to hold, although without any precedent so far as I know, that he was responsible for the loss on that account which he did not interpose to stop, while he might have done so to the effect of preventing that loss. But I am unable to differ from the conclusion of the Lord Ordinary that the evidence is insufficient to support liability on that ground. The case is not a claim of damages for sanctioning this commencement of an irregular account which in the end proved baneful, but for misapplying or authorising the misapplication of money, which, being misapplied, was lost in whole or in part.

I do not think it necessary to refer more particularly to the evidence, and only say, or rather repeat, that I concur in the conclusions of the Lord Ordinary before whom it was taken.

Lord Craighill and Lord Rutherfurd Clark were of the same opinion.

The Lord Justice-Clerk was absent.

The Court adhered.

Counsel for Appellant (Reclaimer)—Pearson—

Dickson. Agents—Mackenzie, Innes, & Logan, W.S.

Counsel for Respondent—Robertson—Murray. Agents—Tods, Murray, & Jamieson, W.S.

Friday, June 9.

FIRST DIVISION.

[Sheriff of Selkirkshire.

MULDOON *v.* PRINGLE, *et e contra.*

Executory Contract—Breach of Contract—Fulfilment of Counterpart—Effect of Payment of Instalments without Objection Taken to Quality of Work Done.

A landed proprietor entered into a written contract with a drainage contractor for the drainage of certain lands forming part of his entailed estate by means of drains of a certain depth, at a fixed cost per rood. Payment was to be by instalments of not less than a certain amount as the work proceeded. It was stipulated that the work should be done to the satisfaction of the employer, or of an inspector to be appointed by him, and also of a Government inspector acting on behalf of the Inclosure Commissioners. The employer appointed his own land-steward to be inspector of the work on his behalf. The work then proceeded, and the drains were made and filled in without any objection being taken to them by either inspector, and a number of instalments of the price were paid.

In an action by the contractor for payment of an alleged balance of the contract price, the proprietor proved that none of the drains in the whole work had been dug to the depth contracted for. He raised a counter-action of damages for the damage sustained through the insufficient character of the work. *Held* (1) that the contractor not having done the work according to the contract, he was not entitled to payment of any of the price so far as unpaid; (2) that the work having been accepted by the inspectors, and payment having been made without objection, he was not entitled to repetition of the price so far as already paid, or to damages for the insufficient nature of the work.

The earlier of these actions was an action by Muldoon against Alexander Pringle, Esq., of Whytbank, for the sum of £112, 0s. 11d., being the balance of the contract price of certain drainage operations which the pursuer had contracted to execute upon the defender's estate. The defence was that the pursuer had not performed the work contracted for according to contract, in respect particularly of the depth to which the drains had been cut. The defender alleged that instead of the drains being 3½ feet deep according to contract, they were almost without exception of a much smaller depth. He maintained that the pursuer was not only not entitled to payment of the sums sued for, but was bound to make repetition of sums already paid to account, as having been paid in excess of the value of the work done. He raised a counter-action to compel implement of the contract and for damages for non-implement of it. In this action he concluded for decerniture against Muldoon to complete his part of the minute of agreement constituting the contract between them, for payment of a penalty of £20 stipulated to be paid by the party neglecting to perform his part of the contract, and of £200 "as compensation for breach of contract, delay, and damage to be sustained" by him through the opening of the drains, breakage of pipes, and operations necessary fully to implement the minute of agreement. Alternatively, in the event of Muldoon refusing to implement his contract, he concluded for decree for the stipulated penalty of £20, and for £500 as damages for breach of contract. He averred, *inter alia*, that his estate was entailed, and that in consequence of the insufficient depth of the drains he would be unable to charge the expenditure as improvement expenditure on the estate.

From the proof in Muldoon's action the following facts appeared:—On 20th November 1879 a minute of agreement was entered into by which Muldoon (the second party) agreed to execute such works as Mr Pringle (the first party) should require for the drainage of his lands at Yair previous to 1st May 1880. "And for that purpose to cut ordinary drains 3½ feet deep, and at such distances apart as may be pointed out to him, and drains which may be required as leading drains, or for outlets of such depth as may be required to form proper outlets for the drainage, but not less than 3½ feet in depth, and to lay the pipes and fill in the drains, taking care to cut neatly and remove the turf and lay it aside and replace it on the top of the drains after they have been filled in, and properly to beat down turf on top so as to secure a growth of grass as formerly, all at the rate of one shilling per rood of 18 feet, whatever the nature of the soil or subsoil may be, the bottom of all the drains to be cut smooth and even, so as to secure a continuous flow of water along the pipes, and the pipes are to be laid and all the ordinary drains filled in within three days of their being cut, and the leading drains or outlets within six days after the drains leading into them have been completed; but no pipes shall be covered up until they have been seen by the first party, or by an inspector appointed by him to examine the same . . . And he agrees and becomes bound to execute and complete the whole drainage works which may be entrusted to him to the satisfaction of the said first party, or of any inspector whom he may appoint, and also to the satisfaction of Mr Mitchell, or any other Government inspector who may be employed to examine the same." The minute of agreement then stipulated that the first party should supply the drain-pipes to be used, and pay the sum of 1s. for each rood of 18 feet cut, laid, and filled in as before specified. All payments were to be in instalments of not less than £100, and on condition that the second party should expend at least that sum before any instalment should be paid, and that at the date of payment of each instalment there should be works executed to the amount of not less than £20 over and above the payment made.

Thereafter between the date of the minute of agreement and the end of March 1880 the work was proceeded with, and drains to the extent of 14,160 roods were formed. Mr Pringle appointed