must be borne not by the settled legacies or shares but by the general residue. The immediate result of this judgment was that section 19 of the Finance Act 1896 (59 and 60 Vict. cap. 28) was passed, which provides (1)—". . . (*quotes* v. *sup.*) . . ."

This section does not apply to the case in hand, for the settlement is not contained in the will of the deceased. The result of holding that the settlement estate duty is to be borne by the general residue is that, as the law now stands, if the settlement is by the will of a Scotch testator settlement estate duty is payable out of the settled legacy or property in exoneration of the rest of the deceased's estate. If, on the other hand, the settlement is by some other disposition, the residuary legatees of the deceased are to bear the burden of the settlement estate duty. If settlement estate duty is to be a burden on the general residue here, then not only will there be a difference in Scotland between settlement by will of the deceased and settlement by other disposition, but the effect of the Finance Act of 1894 in this respect will be different in Scotland and in England. The reasoning of Lindley, M.R., *in re Maryon Wilson*, 1900, 1 Ch. 565, involves this. No doubt the judgment in that case was that the settlement estate duty was to be paid out of the residuary estate, but this was because there was a covenant by the father with the trustees of his daughter's marriage settlement that his executors should within six months after his death pay to them the sum of £25,000 "without any deduction," to be held by them upon the trusts of the settlement. Before deciding that the effect of these words was to free the settled fund from liability for the settlement estate duty, the opinion was expressed by the Master of the Rolls that but for these words the settled fund would have had to bear the duty. I think it must be held that Rigby and Vaughan Williams, LL.J. (who concurred in the judgment) concurred in this part of it. The Court of Appeal in that case held that they were not compelled by the language of the statutes to reach what was there described as an utterly irrational conclusion, viz., that if a settlement is made by will the settlement estate duty is to be borne by the settled property, whereas if the settlement is made by deed that duty is not to be borne by that property at all.

With all deference I take the same view. I am therefore of opinion that settlement estate duty on the balance of £3750, more or less, required to make up the said sum of £30,000, should be paid by the second parties.

LORD JOHNSTON was present at the advising, but delivered no opinion, not having heard the case.

The Court answered the first question of law in the case in the negative, and found in answer to the second question that the duties mentioned therein fell to be paid by the second parties.

Counsel for the first parties moved that the first parties be found entitled to the expenses of the Special Case. Counsel for the second parties moved that the expenses should come out of the testamentary estate of Sir Robert Dundas.

LORD PRESIDENT—This is a case in which the expenses must follow the result, there being no arrangement between the parties. We are accustomed in many cases to give expenses out of the estate when the difficulty has been due to some act of the testator. But here that is not so. The question is as to the true meaning of an Act of Parliament. It must always be assumed that parties know the true meaning of Acts of Parliament, and if they go wrong in their construction I fear they must bear the consequences.

LORD KINNEAR and LORD MACKENZIE concurred.

The Court found the second parties liable in expenses.

Counsel for the First Parties — D.-F. Dickson, K.C.—Pitman. Agents—J. & F. Anderson, W.S.

Counsel for the Second Parties—Murray, K.C. — Skelton. Agents — Strathearn & Blair, W.S.

Tuesday, February 6.

SECOND DIVISION.

[Sheriff Court at Paisley.

PATRICK *v.* WHYTE.

Bill of Exchange—Personal Bar—Waiver of Statutory Requirement — Essential Error—Presentment, Dishonour, Notice of Dishonour.

Circumstances in which *held* that the endorser of a bill of exchange had not waived her right to found upon the non-fulfilment of the statutory requirement of presentment of the bill and notice of dishonour, and in respect thereof was free; although an agent on her behalf had sought delay, proposed to compromise, and made a payment to account.

On 24th September 1909 Joseph Patrick, chartered accountant, 203 West George Street, Glasgow, judicial factor on the trust estate of the deceased Dugald Alexander Mactavish, writer in Johnstone, *pursuer*, brought an action in the Sheriff Court at Paisley against (1) Matthew Whyte, residing at Overton, Johnstone; (2) Rev. Quintin Whyte, Inch, Stranraer, and others, trustees and executors of the late Mrs Robina Dick or Michael, who resided in High Street, Johnstone; and (3) Ninian Glen, chartered accountant, 107 St Vincent Street, Glasgow, trustee on the sequestrated estates of Alexander Whyte, grocer, Johnstone, *defenders*, in which the pursuer claimed payment of the sum of

£150, being the balance of a loan evidenced by a bill at six months, dated 14th May 1904, for £400, and arrears of interest thereon.

Defences were lodged by Mrs Michael's trustees.

The pursuer pleaded, *inter alia*—"(3) The late Mrs Michael having recognised her liability on the bill by making a payment to account thereof in November 1908, and thereby impliedly waiving presentment and notice of dishonour, the defences should be repelled."

The defenders pleaded, *inter alia*—(1) In respect of the failure of the holder of said bill to observe the provisions of the Bills of Exchange Act 1882, relative to the presentment thereof for payment and notice of dishonour for non-payment, the said Mrs Robina Michael was thereby discharged."

The *facts* were thus stated in the interlocutor of the Court (*v. also opinions infra*), viz.—"(1) *Finds in fact* that on 4th November 1897 the bill for £400 at three months' date was drawn by Alexander Whyte, the constituent of the defender Mr Ninian Glen, upon and accepted by the defender Matthew Whyte, and endorsed blank by the late Mrs Michael, the mother of Alexander and Matthew Whyte, and author of the compearing defenders; (2) that the said bill was for the accommodation of Matthew Whyte, and the drawer and indorser lent their names as accommodation parties thereto; (3) that the said bill was discounted by the Union Bank of Scotland, Johnstone; (4) that when the said bill came to maturity on 7th February 1898 it was not retired by the parties, but, at the request of Matthew Whyte, the late Mr Mactavish, upon whose estate the pursuer is judicial factor, advanced the money to take up the bill; (5) that with the consent of all three parties to the bill the advance by Mr Mactavish was treated as a loan to Matthew Whyte, for which Mr Mactavish held the said bill as security, and interest thereon at four per cent. was thereafter paid half-yearly by Matthew Whyte up to and including Whitsunday 1904: *Finds in fact and law* that the said bill became prescribed in February 1904: *Finds further in fact* (6) that the said loan not having been repaid, Mr Mactavish prepared a second bill, dated 14th May 1904, again for £400, at six months' date, which was signed by Alexander Whyte as drawer, by Matthew Whyte as acceptor, and by the late Mrs Michael as indorser, sometime in July 1904; (7) that the £400 for which that bill was drawn represented the sum already lent by Mr Mactavish to Matthew Whyte; (8) that this bill was not discounted but kept by Mr Mactavish as security for the loan, upon which half-yearly interest at the rate of four per cent. was continued to be paid by Matthew Whyte; (9) that at Martinmas 1904 a client of Mr Mactavish, a Mrs Maclaine, gave value for the bill, and it was subsequently held by Mr Mactavish as agent on her behalf, until his death in 1907; (10) that subsequent to the death of Mr Mactavish the pursuer gave value for the said bill to the said Mrs Maclaine, and *finds in fact and law* that the pursuer is now holder of the said bill, and *finds in law* that the said bill being indorsed in blank is payable to bearer: *Finds further in fact* (11) that the bill was not presented for payment at maturity, that it was not dishonoured, and no notice of dishonour was sent to Mrs Michael, the indorser; (12) that on 12th May 1908 Messrs Holmes & Co. wrote to Mrs Michael, as agents for the "holder of the joint acceptance for £400 by you and Mr Alexander Whyte and Mr Matthew Whyte, to intimate that payment of the balance remaining due thereunder is now required"; (13) that Mr Stirling, Mrs Michael's agent, having been consulted about said letter, advised her that she was liable to pay as demanded, and with her authority paid Messrs Holmes & Co. £150 to account on 2nd November 1908; (14) that on 3rd November Holmes & Co. wrote to Mr Stirling acknowledging receipt of the £150 towards payment of the sums due "under acceptance . . . . on which Mrs Michael is liable as endorser," and enclosing a copy of the bill; (15) that on 4th November Mr Stirling advised Mrs Michael that he did not think she would require to pay the balance; (16) that Mrs Michael died on 10th March 1909; (17) that Mr Stirling made no reply to Holmes & Co.'s letter of 3rd November 1908, nor to their subsequent letters, dated 5th December 1908 and 9th January 1909, and never, until he wrote the letter of 30th July 1909, stated to them either that Mrs Michael claimed repetition of the £150, or that she repudiated liability for any further payment; (18) that there is no evidence to show what instructions, if any, Mrs Michael gave to Mr Stirling on 4th November 1908 or subsequently, and none to show that she knew he had received the said letters of 5th December 1908 and 9th January 1909."

On 19th July 1910 the Sheriff-Substitute (LYELL), after a proof led, found in law that Mrs Michael had by her actings waived any objections she might have had that the statutory requirements of presentment for payment, dishonour, and notice of dishonour, had not been fulfilled, repelled the pleas for the defenders, and decerned against them in terms of the conclusions of the initial writ.

The defenders appealed to the Sheriff (KENNEDY), who on 24th February 1911 recalled the interlocutor of the Sheriff-Substitute, found in law that Mrs Michael was discharged of all liability as endorser of the bill, repelled the third plea-in-law for the pursuer, sustained the first plea-in-law for the defenders, and assoilzied them.

The pursuer appealed to the Second Division of the Court of Session.

Argued for the appellant—Mrs Michael had waived her objections to the lack of the statutory requirements and admitted her liability on the bill by asking for time to pay, suggesting compromises, making a payment to account, and giving a promise to pay the balance. (1) In order to displace the presumption that Mrs Michael had

waived her objections, the respondents would have to show that the acts or writings founded on, which established the presumption of waiver, had been caused by misrepresentation or ignorance of some essential fact. But the respondents could show neither of these things. (2) In any event it would not be enough for the respondents to show mere ignorance on the part of Mrs Michael, apart from misrepresentation, because Mrs Michael might have waived all inquiry into the facts—a possibility which the respondents would have to disprove also—Bell's Commentaries (7th ed.), vol. i, p. 446, note 1; *Balfour* v. *Smith & Logan*, February 9, 1877, 4 R. 454, 14 S.L.R. 316; *Kelly* v. *Solari*, November 18, 1841, 9 M. and W. 54, *per* Lord Abinger, 57; *Great Western Railway Company* v. *M'Carthy*, February 14, 1887, 12 A.C. 218, *per* Lord Watson, 234. (3) The *onus* of disproving waiver implied by the actings of a party was especially heavy in such a case as the present where the party was dead, because it necessitated an inquiry into the state of mind of a deceased person. (4) The essential fact of which it was said Mrs Michael was ignorant was a fact which it was admitted she had once known. Therefore the *onus* was especially heavy. (5) It would not be enough for the respondents to show ignorance on the part of Mrs Michael of the general law. They would need to show ignorance of an essential fact or of some particular right depending on the construction of some particular document—Bell's Prin., sec. 534; *Wilson & M'Lellan* v. *Sinclair*, December 7, 1830, 4 W. and S. 398; *Schofield* v. *Londesborough*, [1896] A.C. 514, *per* Lord Watson, 533; *Cooper* v. *Phibbs*, (1867) L.R., 2 H.L. 149, *per* Lord Westbury, 170; *Beauchamp* v. *Winn*, (1873) L.R., 6 H.L. 223. The respondents' proposition that nothing done after an act could affect its consequences was fallacious, because the state of a person's mind could be inferred from what happened after an act, although, of course, the quality of the act could not be altered. In this case there was no proof that there had been any misrepresentation, or that Mrs Michael was under any error with regard to either the facts or the law. The appellant also referred to the following authorities to show what constitutes waiver—Byles on Bills (17th ed.), pp. 283, 284; Bell's Commentaries, *supra; Allhausen & Sons* v. *Mitchell & Company*, February 23, 1870, 8 Macph. 600, *per* Lord Justice-Clerk, 603; *Shepherd* v. *Reddie*, March 1, 1870, 8 Macph. 619, 7 S.L.R. 339; *Lundie* v. *Robertson*, 1806, 7 East 231; *Taylor* v. *Jones*, 1809, 2 Campbell 105; *Campbell* v. *Webster*, 1845, 15 L.J. (C.P.) 4; *Woods* v. *Dean*, 1862, 32 L.J. (Q.B.) 1; *Cordery* v. *Colville*, 1863, 32 L.J. (C.P.) 210, *per* Byles, J., 211; *Killby* v. *Rochussen*, 1865, Scott's Reports, 18 C.B. (N.S.) 357; *Stewart* v. *Kennedy*, March 10, 1890, 17 R. (H.L.) 25, 27 S.L.R. 469.

Argued for the respondents—A payment to account did in the general case raise a presumption of waiver, but in such a case as the present, where the inducing cause of the payment was the misrepresentation that Mrs Michael was an acceptor, the presumption was displaced. Mrs Michael could not be held to have waived a right of whose existence she was unconscious, and nothing which happened after the payment could affect its legal nature. The question in the present case was very similar to a question of homologation—Erskine's Institutes, iii. 3, 48—but there had been no homologation here. There was a presumption against the revival of an obligation—*Darnley* v. *London, Chatham, and Dover Railway*, (1867) L.R., 2 H.L. 43, *per* Lord Chancellor, 57. The case fell to be decided on a question of essential error of fact, not of law—*Miller* v. *Anderson*, March 4, 1831, 9 S. 542; *Johnston* v. *Johnston*, March 11, 1857, 19 D. 706; *Douglas* v. *Douglas' Trustees*, June 30, 1859, 21 D. 1066, *per* Lord Justice-Clerk, 1084, and Lord Cowan, 1085; *Mercer* v. *Anstruther's Trustees*, March 6, 1871, 9 Macph. 618. Mrs Michael's forgetfulness was the same as ignorance—Kerr on Fraud and Mistake (4th ed.), p. 475; *Lucas* v. *Worswick*, 1833, 1 Moody and Robinson, 293; *Kelly* v. *Solari, supra; Hood* v. *Mackinnon*, [1907] 1 Ch. 476, *per* Eve, J., 482; *Brownlie* v. *Millar*, June 10, 1880, 7 R. (H.L.) 66, *per* Lord Blackburn, 80, 17 S.L.R. 805; *Bell* v. *Gardiner*, 1842, 4 Manning and Grainger, 11, *per* Tindal, C.J., 24.

LORD DUNDAS—This is a curious, and, in some aspects, a difficult case. The action is for recovery of the unpaid balance alleged to be due under a bill of exchange, with some arrears of interest. The pursuer represents the holder of the bill. The defenders called are the acceptor Matthew Whyte, the executors of his deceased mother Mrs Michael, who endorsed the bill, and the trustee on the sequestrated estate of Alexander Whyte, the drawer, brother to Matthew. Only Mrs Michael's executors have appeared to defend the case. The bill was one at six months, dated 14th May 1904. A sum of £100 was repaid by Matthew Whyte in July 1907, and a further payment of £150 was made on Mrs Michael's behalf on 3rd November 1908 under circumstances to be referred to; the balance sued for is therefore £150. The bill is the sequel of an earlier one, dated 4th November 1897, at three months, drawn by Alexander Whyte on his brother Matthew and endorsed by their mother, which was admittedly for the accommodation of Matthew, and became prescribed in February 1904. . . . It seems that in the courts below some objections to the pursuer's title were stated or "reserved" (whatever that may mean), but there is no plea to title, no objection of the kind was stated at our bar, and it must be taken that none such exists.

I do not think there is any serious difficulty or dispute as to the general law applicable to such a case as this. At all events we are fortified in that respect not only by the Sheriff's learned disquisition, ranging from Ulpian to modern times, but also by a copious citation of authorities at the bar. The difficulty arises rather upon

the facts, and in regard to the inferences to be drawn from them, and the presumptions of law as affecting the *onus probandi* as it shifts from one party to the other. The position and obligations of an endorser are clearly enough defined by the Act of 1882. He engages that the bill, on due presentment, shall be paid, and that if it be dishonoured he will compensate the holder, provided that the requisite proceedings on dishonour are duly taken. The bill must be duly presented for payment, and if it is dishonoured due notice must be given to the endorser, otherwise the endorser is discharged. But both presentment and notice may be dispensed with by waiver, express or implied. In the present case it is admitted that the bill was not duly presented, and that no notice of dishonour was given to the endorser. But the pursuer pleads implied waiver of these conditions on the part of Mrs Michael. The evidence as to the material facts is very scanty, and we must be careful to apply to them correct presumptions of law and to draw correct inferences from them. The learned Sheriff says, and I think rightly, that the question turns "largely on the incidence of the burden of proof, and on the inferences to be drawn from the facts." But I do not quite accept his statement that "the issue in the appeal is whether the pursuer has proved his replication," *i.e.*, the implied waiver, and that "the pursuer has not proved his replication." It is no doubt for the pursuer, in the first instance, to establish facts and circumstances sufficient, if not otherwise explained, to infer waiver, and I think that beyond question he has done so. I do not doubt that the request by Mrs Michael's agent (Mr Stirling) for time, his offers of compromise, and the payment of £150 to account, would, if unexplained, amount to ample evidence of waiver. But the burden of proof then shifts to the defenders to explain these facts, if they can do so, upon a footing other than that of waiver. They undertake to do this by showing that the payment was made by Mrs Michael under essential error in fact, induced (they say) by the pursuer's agents. One must consider whether or not they have succeeded in discharging the *onus probandi* on this point; and if they have done so, one must next consider whether the pursuer, upon whom the burden of proof would again fall, can make out a case of waiver by evidence of anything subsequent to and independent of the payment of £150. If he cannot his plea of waiver would finally fail. That is the shape of the case as it occurs to my mind, and it is necessary to define it clearly at the outset, because though I have come in result to the same conclusion as the learned Sheriff, the train of reasoning has not, I think, been the same as his.

The demand for payment of the balance (then £300) due under the bill was made by a letter of 12th May 1908 from Messrs Holmes & Company, the pursuer's agents, to Mrs Michael. The letter is unfortunately expressed, for it alludes to "the joint acceptance for £400 by you and Mr Alexander Whyte and Mr Matthew Whyte," and the words "joint acceptance" recur in their letter of 4th August. I see no reason at all for supposing that these words were used by Holmes & Company with any dishonest or sinister design to conceal the fact that Mrs Michael was not an acceptor but an endorser of the bill. I think it is a great pity (to use no stronger term) that Mr Stirling should have thought fit to take up that attitude and maintain it in the witness-box; and the defender's counsel at our Bar (very properly, as I thought) disclaimed any injurious suggestion of the kind. Still the words "joint acceptance" were inaccurate, and would, I think, be apt to mislead anyone ignorant of the exact position of Mrs Michael in regard to the bill. Mr Stirling says he was misled, and assumed at once, and without thought of further inquiry, the accuracy of Messrs Holmes' assertion (as he considered it) that Mrs Michael was liable as an acceptor. It does seem strange that he should not have taken the trouble to see the bill for himself or to ask Holmes & Company for further details about it. His office and their office are in the town of Johnstone. He was in correspondence with them, and on perfectly good terms with them; and quite a number of meetings between Mr Stirling and members of the firm are spoken to in the proof during the period from May to the end of October 1908. But I do not say that Mr Stirling neglected his duty in taking the matter for granted, as he says he did, without further ado. Mr Stirling and Mrs Faulds—Mrs Michael's daughter—tell us that Mrs Michael, on receiving Holmes & Company's letters, was "much put about," and said she would not pay because she thought the bill "had been discharged and out of the way"; but that, on Mr Stirling's pressure, and his advice that she was undoubtedly liable to pay, Mrs Michael consented to the realisation of some heritable property, and to the payment of £150 to account on 2nd November 1908. Down to this point the defenders' case wears a very plausible aspect, for I think one is bound, upon the evidence, to believe that the payment of £150—which of itself afforded *prima facie* evidence of waiver—was authorised by Mrs Michael only because her agent advised her that she was bound to pay. The Sheriff-Substitute takes the view that neither she nor her agent was in fact misled at all by the words "joint acceptance." He thinks she "must have known quite well what that meant." This is matter of opinion and conjecture, but I cannot hold it proved as matter of evidence. Accordingly I think that at this important stage the *onus* shifts back to the pursuer to establish his plea of waiver by something occurring after the payment, and apart from the intrinsic weight of that fact. There is no doubt that what happened later gives him ground for a serious argument.

On 3rd November Messrs Holmes acknowledged receipt of the £150, and sent Mr Stirling, in answer to his somewhat tardy

request, a copy of the bill. From that document, as well as from the terms of the letter, it was made perfectly clear to Mr Stirling that Mrs Michael's liability, if any, was as an endorser. Mr Stirling says he saw his client next day. "I reported to Mrs Michael on 4th November that I did not think she would be called upon to pay the balance. By that time I presumed that the statutory requisites had not been given. That was the day I got the letter of 3rd November. I told Mrs Michael that at once." Mrs Faulds is under the impression that she was present at this interview. Mr Stirling does not say so, and his business account does not mention Mrs Faulds as being present on this occasion. The discrepancy, if it be one, is not perhaps of much importance. Mrs Faulds' evidence that "Mr Stirling reported to her" (Mrs Michael) "then that he thought she would not require to pay any more. Mr Stirling asked me and my mother if we had got any notices in regard to this bill. I said no, that she had not got any. He then told me that I would require to go and make a search for notices in regard to this bill. I made a search for notices, but found none." Mr Stirling says that Mrs Faulds told him on 12th November that she could find no trace of notices of any kind. Now the amazing fact is, that although Mr Stirling was, as he says, made aware on 4th November that he had been misled (wilfully, as he maintains) by Holmes & Company, and had in consequence induced his client wrongfully and needlessly to pay them £150, he left their letter absolutely unanswered, making no protest against the deceit he alleges had been practised on him, no demand for repayment of the £150, and no repudiation of further liability on the part of his client. His silence remained unbroken even when he received from Holmes & Company a letter dated 5th December, with a demand for interest due down to 11th November, though he sent the letter on to Alexander Whyte on 7th December, saying—"I shall be pleased to have your instructions. If you think that I should communicate with your mother I shall do so." On 9th January 1909 Messrs Holmes wrote to Mr Stirling that they were instructed to press for an "immediate settlement of the balance." Mr Stirling made no reply. On the 12th he had a meeting with Mr M'Killop (of Holmes & Company), but gave no hint of repudiation or of any error induced in his mind, fraudulently or otherwise. Mrs Michael died on 10th March 1909. On the 16th Holmes & Company once more wrote to Mr Stirling for a "settlement of the claim." His reply, on the 17th, is in curiously non-committal terms, ending "I cannot convene a meeting" (of the trustees) "until next week. Meanwhile no creditor can now be prejudiced in any way." It was not till 27th July that Mr Stirling indicated any suggestion of non-liability. He wrote—"I shall be pleased to know if there is any intention to prosecute a further claim against Mrs Michael's estate. In such an event I shall be pleased to have an opportunity of considering any evidence which you may have of notice of dishonour for non-payment having been given to the endorsers." Holmes & Company in reply sent a statement of their claim for £150 and interest, and added—"No question of notice of dishonour, so far as we are aware, arises. Mrs Michael knew the nature of the loan transaction, and recognised her liability for repayment, and we do not suppose that you suggest any question about this." Mr Stirling's answer on 30th July was in effect a declaration of war. It is a curious document. He states that the letter of 12th May 1908 "came as a surprise to" Mrs Michael; but that, "accepting unhesitatingly as accurate your statement that she was a joint acceptor, I advised that she could not repudiate her obligations under her 'joint acceptance,'" and she was prevailed upon to pay the £150. Mr Stirling adds that "the question of repetition considered and postponed before Mrs Michael's death will now be dealt with." I may observe that there is no trace in the evidence that any such consideration ever took place. On the contrary, Mr Stirling (from whatever motive) seems never to have suggested repetition; and the case was argued (as I gather) in the Courts below, and certainly at our Bar, on the footing, which is probably correct, that repetition could not in any view be enforced looking to Mr Stirling's course of acting or of non-acting.

One must carefully consider the effect of this correspondence and of the action (or rather want of action) of Mrs Michael's accredited agent. I think, as already said, that the defenders must on the evidence be taken to have proved that the payment of £150 was authorised by Mrs Michael, owing to Mr Stirling's advice that she was legally bound to pay. But the question at the moment is not as to recovery of the £150—that was treated in the argument on both sides as past praying for—but as to her further liability for the unpaid balance. I cannot doubt that if Mr Stirling had been himself the endorser, or if we had only to consider his state of knowledge, the defenders' case would fail. It is clear that on and after 4th November Mr Stirling was under no error at all as to his client's position. He knew she was an endorser. He presumed (and rightly) that the statutory requisites had not been complied with, and Mrs Michael was *ex hypothesi* discharged. Yet he maintained an unbroken silence in spite of the payment to account, and of Messrs Holmes' repeated demands for settlement of principal and interest. I confess that Mr Stirling's attempted explanations of his attitude leave me in bewilderment. They are really not explanations at all. As given both in cross-examination and in various replies to the Sheriff-Substitute, they seem to me to be inadequate, inconsistent, and I must add far from candid. And if this were a case where a pursuer was dealing with the defenders' accredited agent and relying on the faith of his actions, or it may be of his silence,

the agent's conduct might well be held to bind his principal. But that is not the kind of case we have here. The question is not as to Mr Stirling's conduct or what Messrs Holmes were entitled to infer from his silence, but whether or not the Court is to infer from his silence a tacit waiver by Mrs Michael and her acceptance of a liability which she was in a position by law to dispute. It is her state of knowledge after all and not Mr Stirling's that is in issue.

Mrs Michael is unfortunately dead, and the evidence as to her state of knowledge and of mind is extremely scanty. I think we must take it that Mr Stirling advised her on 4th November that he thought she would not require to pay any more. What is there to show that after that date, when the embargo of his previous advice was removed, she decided to pay the balance of the bill, knowing she might in law object to do so? There is Matthew Whyte's evidence, but it seems to be in parts exaggerated and lacking in precision, and while I see no reason to characterise it as untrue, it would not, I think, be enough by itself to prove waiver on his mother's part. There is really nothing else. The fact of Mr Stirling's silence loses weight, in this aspect of the case, when one considers that there is no evidence that Mrs Michael was aware of Messrs Holmes' demands for payment after 4th November. His silence thereafter is not therefore necessarily her silence. Nor is it proved what instructions (if any) Mrs Michael gave to Mr Stirling on that day. I do not think there is room for any inference that she instructed him that, whether legally bound or not, she was desirous to pay the balance of the bill. There is no evidence of this; it would have been contrary to what we must suppose was her attitude of mind previous to 4th November; and no further steps were in fact taken prior to her death towards payment by way of realisation of property or otherwise. It is true, on the other hand, that there seems to be equally little room, when one considers the fact of Mr Stirling's silence, for an inference that Mrs Michael instructed him to intimate to Messrs Holmes her refusal to make any further payment. We are left to suppose that she gave no instructions at all. But the presumption is, I apprehend, *in dubio* adverse to waiver; and having done my best to scrutinise the evidence, and to follow the shifting burden of the proof, my conclusion is that waiver has not been proved, and that the pursuer's case must fail. I think we should recall the interlocutors of the Sheriff and of the Sheriff-Substitute, repeat the first eleven findings contained in the latter interlocutor, and make additional findings in fact and in law upon the lines and to the effect I have indicated.

LORD SALVESEN—This action is brought for payment of £150, the balance of a sum of £400 contained in a bill. The bill is dated 14th May 1904. It is drawn by Alexander Whyte upon and accepted by Matthew Whyte, and is endorsed by the late Mrs Michael, who was the mother of the other parties. Alexander Whyte has become bankrupt. Matthew Whyte is in financial difficulties, and although the action is also directed against the trustee on the sequestrated estates of Alexander and against Matthew, no defences have been lodged on their behalf. The dispute therefore narrows itself to this, whether the trustees of Mrs Michael, who are the other defenders, are liable for the unpaid balance of the bill.

The bill of 14th May 1904 took the place of an earlier bill to which the same persons had been parties, but which at that date had prescribed. The first bill was granted to secure a loan made to Matthew Whyte by the late Mr Mactavish, on whose estate the pursuer is judicial factor. Mrs Michael endorsed it in order to provide the holder with her obligation as cautioner for her son in the event of his not being able to meet the bill. While the bill is dated 14th May, it was not granted till some four months later and within two months of its due date. It was not presented for payment to Matthew Whyte, but he continued to pay interest upon it at the rate of 4 per cent. for some years, and he also paid a sum of £100 towards its extinction.

On 12th May 1908 Messrs Holmes & Co., writers in Glasgow, who acted on behalf of the then holder of the bill, wrote to Mrs Michael intimating that payment of the balance of £300 remaining due thereunder was required. At that date Mrs Michael's liability had been discharged by the holder's failure to present the bill in due course to the acceptor, but after some correspondence Mr Stirling, writer, Johnstone, who acted on Mrs Michael's behalf, on 2nd November 1908 made a payment of £150 to Holmes & Co. in part payment of the bill. This payment is founded on as a waiver of presentment to the acceptor, and as reconstituting the obligation which Mrs Michael had originally incurred as an endorser. While a great many authorities were cited on both sides of the bar, and are referred to by the learned Sheriff, the difficulties which the case admittedly presents do not arise from any uncertainty as to the law. A part payment by an endorser of a bill after his liability has been discharged by failure to present it to the acceptor and to give notice of dishonour if payment has not been made when presented is presumed to operate as a waiver of due presentment and notice, but if such payment is made under a mistake in fact it cannot be founded upon as reconstituting the original obligation. This is the defence which the executors of Mrs Michael now make to the claim. The *onus* of establishing it in the face of a payment made by or on behalf of the endorser, which must be presumed to have been made in the knowledge of the facts connected with the bill, lies upon the person alleging the mistake. The difficult question in this case is whether that *onus* has been discharged.

In considering this question regard must be had to the position of the parties and

the whole circumstances. In November 1908, when the payment was made on Mrs Michael's behalf, she was a woman about seventy-six years of age and possessed only some small heritable property, on the income of which she depended for her subsistence. She had carried on business as a grocer for many years in a small way, but was illiterate in the sense that she could not read or write, except that she could sign her name. The proof does not disclose whether her inability to read applied only to handwriting and not to print, but this is of small consequence. Her relations with Matthew, for whose benefit she had originally become a party to the bill, had ceased to be of a cordial nature. Subsequent to the granting of the bill now sued on she had at his request signed a bill for £200 for the benefit of the Globe Gas Engine Company, to which Matthew had sold his business and of which he was managing director. She had been told by Matthew, or at all events understood, that on signing that bill she would not be called upon to meet any obligation under the prior bill for £400. The Globe Company had gone into liquidation prior to 1st May 1908, and Mrs Michael was called upon to provide the £200 for which she had become an obligant by the bank which then held the bill. When on 12th May 1908 a claim was made on the old bill for £400 she was much perturbed, and she showed in a very conclusive manner her displeasure at the deception which she believed had been practised upon her by Matthew by executing a codicil on 22nd May 1908 cutting him out of any share in her succession. It may be assumed, therefore, that if she had known that the bill of 1904 was no longer a good document of debt against her she was in no mood to undertake any new obligation for Matthew's benefit. Nor does it appear that she had any special knowledge or regard for the then holder of the bill, Mrs Maclean, although she was prepared to meet whatever legal obligation she had undertaken.

These being the circumstances, I think it is plain that Mrs Michael would not have undertaken liability for the sum of £300, which represented a considerable part of her means, unless she believed that she was legally liable. That she might waive inquiry as to whether she was liable or not in order to prevent the whole sum being demanded from her is of course possible, although I cannot regard it as probable in the circumstances in which she was placed.

The case, however, does not stop there. The letter from Holmes & Company of 12th May was most unfortunately expressed. In demanding payment from Mrs Michael they described the bill as "the joint acceptance for £400 by you and Mr Alexander Whyte and Mr Matthew Whyte." These words are free from ambiguity, and represent that Mrs Michael had signed the bill as a joint acceptor along with her two sons. This misdescription by writers of high standing in Glasgow who actually had the bill in their possession at the time was, I think, most misleading. The bill was again referred to on the 4th of August as "a joint acceptance," and it was not until after the payment had been made that Mr Stirling, who acted for Mrs Michael, ascertained that her position on the bill was not that of an acceptor at all but that of an endorser. Messrs Holmes & Company's letter also proceeded upon the footing that there was no question of the liability of Mrs Michael to the holder of the bill; and Mr Mackillop, by whom the correspondence was conducted, says that it did not occur to his mind that any objection was possible or likely with regard to the form of Mrs Michael's obligation. If that were so, then it must have been on the footing that there had been due presentment and notice of dishonour given to the endorser, a matter upon which apparently Mr Mackillop had no information at the time.

The evidence of Mr Stirling, who conducted the negotiations on Mrs Michael's behalf, is to the effect that he accepted the statement of Holmes & Company that Mrs Michael was a joint acceptor; that under the error so induced he advised her that she had no defence to the claim and obtained her authority to settle it. His statement is corroborated by Mrs Faulds, a daughter of the deceased Mrs Michael, who was in the confidence of her mother, and who says she was cognisant of all the transactions that took place at the time. She says—"She [Mrs Michael] would not allow Mr Stirling at first to arrange for payment under the £400 bill. As time went on, Mr Stirling took up the position that it must be paid, and it was only on the pressure Mr Stirling brought to bear on my mother that she consented to pay it. She ultimately consented to Mr Stirling raising money by bond for paying this £150, the £200, and some obligations which we got a note of." I see no reason to doubt this evidence, whatever may be said of some of the other statements which Mr Stirling made and to which I shall afterwards have occasion to refer. Mr Stirling had no conceivable motive, but quite the contrary, to advise his client to meet an obligation which had long since been discharged and for which that client (although on other grounds) considered herself not liable. That he should have urged her to pay £150 out of regard to the holder of the bill is to my mind in the circumstances unthinkable, and there is not a fragment of evidence pointing in that direction. Had the matter therefore stopped there I think there would have been only one conclusion on the evidence, namely, that Mrs Michael authorised her agent to make the payment on which the plea of waiver is founded under the advice of her agent, who gave that advice because he erroneously believed, in consequence of Messrs Holmes & Company's representations, that she was liable on the bill as an acceptor. Had he ascertained that her true position was that of an endorser I entertain no doubt that he would have first made

inquiry as to whether there had been presentment of the bill to the debtor and notice of dishonour to Mrs Michael, and had he learned that there had been no such presentment I feel satisfied that he would have given the opposite advice and that his client would only have been too glad to act upon it.

In Mr Stirling's letter of 2nd November containing the remittance of £150, he asked Messrs Holmes & Co. to annex to their letter of acknowledgment a copy of the bill, "as I have not seen it at any time." This letter was answered next day, and a correct copy of the bill was annexed. It was then brought home to Mr Stirling's mind that his client was merely an endorser, and on the same day that he received the letter he had an interview with Mrs Michael and Mrs Faulds, and learned from them that so far as they knew no notice of dishonour had ever been received. It is matter of great surprise and of some reflection on Mr Stirling that he did not at once communicate with Messrs Holmes and point out that he had sent the payment of £150 on the footing that Mrs Michael was a joint acceptor of the bill, and asked them how her liability as an endorser still continued. He gives various more or less inconsistent explanations of his silence. None of them, I think, satisfactorily explains it. I think it was Mr Stirling's plain duty to have intimated that he had advised his client to make the payment on an erroneous footing, and to have asked the money to be returned. The pursuer desires us to infer from his silence that he was not in fact misled; and if the obligation contained in the bill had been Mr Stirling's own, I think the inference would have been that as Mr Stirling presumably knew in what capacity he had signed the bill and took no objection to the footing on which payment had been demanded of him, he could not be heard to say that he believed himself to be an acceptor at the time when he made the payment. But it is a different question whether Mrs Michael's estate has to suffer because of his failure in his duty towards her. There is no suggestion that she was ever made aware of the difference between an acceptor's and an endorser's liability, or that the soundness of her agent's advice to her depended on her being an acceptor. Her ignorance of the general law would not have excused her, but if the advice upon which she acted proceeded on an error in fact on the part of her adviser, it is just the same as if she had herself made the payment under the same mistake. The true explanations of Mr Stirling's silence I believe to be that he felt that he might be charged with carelessness in not ascertaining what Mrs Michael's true liability on the bill was before advising her to pay it and remitting £150 to account of it. I do not think that he could have been seriously blamed, looking to the precise way in which the bill was described in Messrs Holmes' letter of 12th May, but it was obvious that trouble might be incurred in recovering back the payment of £150, and that reflections might be made on Mr Stirling for having acted precipitately without full knowledge of the facts. Whether this be the true explanation or not, I do not think it can be inferred that Mrs Michael, who acted on the advice of her agent, and who, I have no doubt, had completely forgotten all about the bill except that she had signed it, was not misled, and if so, the payment of £150 was authorised by her under an error and therefore was not a waiver of her rights as an endorser. Mr Stirling's conduct after he had discovered the truth cannot be treated as a new waiver by his client. I admit the cogency of the inference to be drawn from his conduct as bearing on the question whether Mr Stirling and his client were in fact misled and paid the £150 under error, but I do not think it is sufficient to displace the positive evidence of Mr Stirling and Mrs Faulds, or to convict Mr Stirling of perjury as regards the crucial parts of his testimony.

The pursuer founded strongly on the evidence of Matthew Whyte to the effect that his mother constantly recognised her liability for Mrs Maclean's bill. That, however, does not in the least conflict with the view that she did so because that was the advice she had received from Mr Stirling, proceeding, as I hold, on essential error as to the facts. The cross-examination of Matthew Whyte also tends to show that he is far from being a reliable witness.

I have therefore come to the same conclusion as the learned Sheriff, and although the matter is not properly before us, I should like to state that as at present advised I agree with him that the claim for repayment of the £150 is probably barred by the delay in putting it forward. There can be little doubt that Messrs Holmes & Co. allowed time for the further payment of the bill in respect of the part payment which they had received, and they have been prejudiced in their remedies against Matthew Whyte by the belief which had been induced that Mrs Michael accepted liability on the bill. To that extent Mr Stirling's conduct may have resulted in a loss to his client's estate, but it does not at all follow that that estate is to be subjected to a further claim for £150, of which it had at that time been discharged.

Lord Justice-Clerk—I confess that I had for some time considerable doubt as to this case. I did not feel myself able in all respects to follow the reasoning of the Sheriff. But I have in the end come to the same conclusion as that at which your Lordships have arrived. Your Lordships' opinions so clearly bring out the points of the case that anything I could say would be mere repetition. I content myself therefore with expressing my concurrence in these opinions, and accordingly I am for adhering to the Sheriff's judgment in effect. The interlocutor proposed by my brother Lord Dundas is, I think, the suitable one in the circumstances.

Lord Guthrie was absent.

The Court pronounced this interlocutor—

"Dismiss the appeal: Recal the interlocutors of the Sheriff and the Sheriff-Substitute, dated respectively 24th January 1911 and 19th July 1910: [*After the findings supra*] Find in law that Mrs Michael was discharged of liability as endorser of the said bill in respect of non-fulfilment of the said statutory requisites, and that it is not proved that she waived her right to found upon said non-fulfilment: Therefore repel the pursuer's third plea-in-law and sustain the defenders' first plea-in-law: Assoilzie the defenders from the conclusions of the initial writ, and decern."

Counsel for the Pursuer and Appellant—Constable, K.C.—D. P. Fleming. Agents—N. B. Constable & Co., W.S.

Counsel for the Defenders and Respondents—Munro, K.C.—W. T. Watson. Agents—Macpherson & Mackay, S.S.C.

Thursday, February 22.

FIRST DIVISION.

[Lord Guthrie, Ordinary.

GIBB *v.* EDINBURGH AND DISTRICT TRAMWAYS COMPANY, LIMITED.

Reparation—Negligence—Duty to Public—Failure to Fence Tramway Car—Averments—Relevancy.

In an action of damages against a tramway company the pursuer averred that while crossing a street she stopped to allow a car to pass her; that her dress was drawn in by the suction caused by the car, which was travelling at full speed, and was caught by the vertical stay of the car, or became jammed between the main stay and the body of the car; that she was thrown to the ground and severely injured; that the accident was due to the fault of the defenders in allowing the lower end of the vertical stay to project to the extent of an inch beneath the body of the car, and in failing to guard both the vertical stay and the main stay, with both of which a woman's dress was apt to become entangled. She further averred that it was the duty of the defenders to have the body of the car between the wheels and the wheels themselves guarded; that this was usual and customary; and that had these precautions been adopted the accident would not have happened. *Held* that the pursuer's averments were relevant, and issue allowed.

Process—Proof or Jury Trial—Action of Damages for Personal Injury—Alleged Defective Structure of Tramway Car.

In an action of damages against a tramway company at the instance of a person who had been run over through her dress becoming entangled with a part of the car, the pursuer averred that the car was of faulty construction in various respects which she specified.

Held that the case involved no such obvious complications as would make it unsuitable for jury trial, and issue allowed.

On 20th June 1911 Mrs Catherine Gibb, widow, 4 Merchiston Avenue, Edinburgh, *pursuer*, brought an action against the Edinburgh and District Tramways Company, Limited, *defenders*, in which she claimed £2000 damages for personal injury sustained, as she alleged, through the fault of the defenders in failing to have their cars properly guarded or fenced.

The pursuer averred—"(Cond. 2) About mid-day on 14th September 1910, when out shopping, the pursuer had occasion to cross from the east to the west side of Lothian Road at a point some yards to the north of the Edinburgh Savings Bank branch office there, near the top of said street. Pursuer in so crossing saw the defenders' car, No. 81, approaching from the south, going in the direction of Princes Street, and she stopped between the two sets of tramway rails with the intention of allowing the car to pass her. There was no car approaching from the opposite direction, that is from Princes Street, near pursuer at the time. The car was travelling at full speed—at the rate of about ten miles an hour. The pursuer had taken up a position midway between the two sets of rails so as to be clear of the car, but when it was about halfway past her the lower part of the skirt of her dress was drawn in by the suction caused by the car and caught by the vertical stay on the right side of the car, or became jammed between the main stay and the body of the car. The pursuer was in consequence thrown violently to the ground and dragged by the car for some distance on the causeway on her face. The right rear wheel of the car passed over her left leg. When the car was brought to a stop it was found that the pursuer and her clothing were so much entangled with the wheel and other parts of the car that she was not able to be extricated therefrom for about thirty minutes. (Cond. 3) The said accident was due to the fault and negligence of the defenders. The bottom end of the upright rod of said vertical stay in the car in question projected thereunder to the extent of about 1 inch. Said projection was unguarded, and was a source of great danger to a person standing at the side of the car as it passed. It was specially dangerous to a woman, as her dress is liable to be sucked in under the car as it passes and to catch on the vertical projection. Further, the main stay was unguarded, and a woman's dress is liable to be caught between the stay and the car. It was the duty of the defenders to have had both the vertical stay and the main stay guarded, but this they failed to do. Had the stays been guarded the accident would not have happened. Further, and in any event, it was the duty of the defenders to have had the