of law raised, or indeed any question of law at all. I regard the matter as one of procedure and discretion. In some of the cases a consideration has been adverted to about the possibility of two appeals; and, for what it is worth, that element is here against the Solicitor-General, because if we were to grant him leave now to appeal, and he were unsuccessful, for aught we know there might be a second appeal at the end of the matter after proof had been taken. On the whole matter I am of opinion that this is a petition which we ought not to grant.

LORD SALVESEN—I agree. One matter that certainly was in my mind when we adhered to the judgment of the Lord Ordinary was, that assuming that the contract had been broken, a difficult question of law might arise as to what damages reasonably and naturally flowed from that breach of contract. A jury, of course, is quite unable to appreciate matters of that kind, and is in the way of assessing damages in a very rough and ready way indeed. Apart from that specialty, which led me to concur in affirming the Lord Ordinary's interlocutor, there are other grounds upon which this may be treated as more or less a special case—indeed, we were not referred to any case that was at all like it. The question we have to decide now is merely, not whether we were right in affirming the Lord Ordinary's interlocutor, but whether we should give facilities to have the matter taken further.

If this be, as I think it is, a matter of procedure only, not touching any legitimate rights that the pursuer has, but merely the mode in which these rights are to be ascertained, and, if ascertained, to be converted into money, then I think we should be stultifying ourselves and acting against the long-established practice of this Court if we granted leave to appeal. That practice has existed since 1866, and has been consistently followed since then. I think this Court is presumably as well able to judge of the procedure that is proper for dealing with cases before it as even the House of Lords. Accordingly I agree with your Lordship that we should refuse this application.

LORD GUTHRIE—I agree. I think the way in which the petitioner has stated his application is sufficient for its disposal. He says, "there being no special cause shown to the contrary." He does not deny that special cause is alleged. The Lord Ordinary has dealt with two matters which he thought amounted to "special cause," and we agree with him. If this motion were granted, the application would be a very frequent one. The reports show that similar applications have come into Court raising exactly the same question—that is to say, whether the special cause that is alleged is or is not sufficient. These applications have all been refused, and refused by both Divisions, and I think we should follow the practice of the Court in this matter.

The Court refused the petition.

Counsel for the Petitioners—Morison, K.C. —Lippe. Agents — Dalgleish, Dobbie, & Company, S.S.C.

Counsel for the Respondents—Clyde, K.C. —Wark. Agents — Hope, Todd, & Kirk, W.S.

Wednesday, November 26.

FIRST DIVISION.

[Lord Hunter, Ordinary.

BRENES & COMPANY *v.* DOWNIE AND ANOTHER.

Company — Contract — Trust — Breach of Trust—Liability of Directors.

In an action against two individuals, the sole directors and shareholders of a company then in liquidation, for repayment of a sum of £1000 transmitted to the company before liquidation for the purpose of retiring certain bills of which the pursuers were the drawers and the company acceptors, it was admitted that the money was received by the company, that it was not employed to retire the bills, that the bills were dishonoured, and that part of it (£700) was applied by one of the defenders to his own purposes, viz., in defraying certain expenses which he alleged he had incurred in connection with the business of the company.

Held that as the money had been remitted to the company for a specific purpose, the defenders were in breach of trust in applying it to any other, and that the pursuers were entitled to decree *de plano* against both defenders, jointly and severally, for £600, and *quoad* the balance, as to which the defenders alleged a counter claim, to a proof.

On 26th May 1913 Brenes & Company, merchants, Costa Rica, and C. S. S. Guthrie, merchant, London, their mandatory, *pursuers*, brought an action against George Downie, coffee planter, Edinburgh, and Andrew M'Dougall, solicitor there, sole directors and shareholders of the Central and South American Land and Produce Company, Limited, *defenders*, for payment of £1550 odd, being (1) the sum of £700, the balance of a sum of £1000 alleged to be due by the defenders after deducting a sum of £300 paid to account; (2) the sum of £750 as damages for injury to the pursuers' credit through the dishonour of certain bills; and (3) a sum of £100 odd, being interest and expenses occasioned by the dishonour of the bills.

The *facts* admitted on record, as summarised by the Lord President in his opinion, were as follows:—"On the 17th July 1912, the pursuers, who are apparently merchants in Central America, transmitted to this country a draft for £1000 sterling, which they specifically set forth in the letter in which it was enclosed was to be

applied to meet three bills which are identified in the letter—bills of which the company were acceptors and the pursuers were drawers. These bills matured at London, and at maturity the sum contained in the draft was to be applied to retiring the bills. It is admitted that the transmission of the money was made in pursuance of an agreement which is expressed in a letter of credit dated 1st April 1912; it is further admitted that the money was actually received in this country, and we have before us a minute of meeting of the company at which the defenders, who are the sole shareholders and sole directors of the company, were present, which recorded the receipt of the letter containing the £1000 and approved of the letter—in other words, the company accepted the trust. It is further admitted on the record that the £1000 was placed to the credit of the company in its account with their own bank on the 8th August. It is also admitted that not one penny of the £1000 was ever applied to retire the bills at maturity. It is admitted that on the 8th August one of the defenders, to wit, Downie, drew upon the bank for £250 of the £1000 that was in the company's account in order to be applied to the specific purpose I have mentioned, and that later in the month —on the 20th August—he drew a cheque for £500 upon the same account and received cash. It is further admitted upon the record that the £250 and £500 were applied by Downie to his own purposes—in other words, in order to defray the expense which he had incurred in the year preceding in a visit to South America on the business of the company."

The pursuers pleaded, *inter alia*—"(5) In any event the defenders are liable to the pursuers in payment of said sum of £700, together with interest and charges thereon, in respect of their receipt and retainer of said moneys as condescended on."

The defenders, *inter alia*, pleaded—"(5) The pursuers' averments so far as material being unfounded in fact, the defenders should be assoilzied. (7) *Separatim*, the defender M'Dougall, not having been *lucratus* by the company's transactions with pursuers, should be assoilzied. (8) The pursuers not having suffered any loss, injury, or damage through the actions of the defenders, the defenders should be assoilzied.

On 21st October 1913 the Lord Ordinary (HUNTER) allowed a proof before answer.

Opinion.—"This is an action of damages brought by a firm of merchants in San José in the Republic of Costa Rica, Central America, against two gentlemen resident in Edinburgh. The circumstances out of which the action arises are somewhat peculiar.

"In or about March 1912 the pursuers acted as representatives in the Republic of Costa Rica of a company called The Central and South American Land and Produce Company, Limited. Of that company the defenders were the sole directors and sole shareholders—the defender Downie being managing director, and the defender M'Dougall being secretary of the company. The nominal capital of the company was £25,000, divided into 25,000 shares of £1 each. Only £200 of the capital was subscribed, represented by the directors' qualification, which was fixed by the articles of association at £100 each. The company is now in liquidation, the First Division of the Court having on 19th November 1912 pronounced an order for winding-up at the instance of the pursuers.

[*After narrating the pursuers' averments his Lordship proceeded*]—"For the defenders it was maintained that the action ought to be dismissed, as the person truly debtor to the pursuers is the company, and as no averment is made that the company is unable to meet the pursuers' claim. It was pointed out that if the defenders in their capacity as directors have misapplied or retained or become liable or accountable for any money or property of the company, the Court may, on the application of the liquidator or of any creditor or contributory of the company, examine into their conduct as directors and compel them to repay or restore the money of the company (S. 215 of the Companies Act 1908). On the other hand, the pursuers argued that if directors used or abused their position as directors to commit a wrong upon an individual they might be directly liable as wrongdoers. In the present case there are averments—which I need not go into in detail—to the effect that the defenders failed to employ the pursuers' remittance for the purpose of retiring the bills drawn upon the company, and, on the contrary, used the money in meeting an alleged claim against the company by the defender Downie, and that the pursuers have in consequence suffered damage. The averments made appear to me to make it advisable that there should be an inquiry before determining any of the pleas of parties. I cannot so read the record and admissions as to hold that I should be justified in the meantime pronouncing decree for payment against the defenders for any part of the sum concluded for. I therefore allow a proof before answer."

The pursuers reclaimed, and argued—The sum of £1000 sent by the pursuers to retire the bills having been remitted for a specific purpose, the defenders were not entitled to apply it to any other. That being so, the pursuers were entitled to decree *de plano* for at least £600, *i.e.*, the balance of the said sum of £1000, after deducting £300 paid to account and a disputed item of £100. The pursuers' claim was based on breach of trust, not on breach of contract. Where, as here, the defenders had been guilty of a breach of trust, they were jointly and severally liable—Palmer on Company Law (9th ed.), p. 199; Pollok on Torts (9th ed.), p. 75; *Cullen* v. *Thomson's Trustees*, (1862) 4 Macq. 424, at p. 432; *La Société anonyme, &c.* v. *Panhard Levassor Motor Company, Limited*, [1901] 2 Ch. 513; *Blyth* v. *Maberly's Assignees*, July 10, 1832, 10 S. 796; *Macadam*

v. *Martin's Trustee*, November 5, 1872, 11 Macph. 33, *per* Lord Deas at p. 37, 10 S.L.R. 30.

Argued for respondents—Where, as here, a charge of fraud was made against the defenders, they (the defenders) were entitled to prove that their actings were innocent. That alone was sufficient to prevent decree *de plano*. The pursuers had made no claim in the liquidation, and that being so they were not entitled to assume that the company had not sufficient assets to meet the bills. *Esto* that there was breach of contract, there was no breach of trust, for the money was not earmarked. The defenders therefore were not liable—*Wilson* v. *Lord Bury*, (1880) L.R., 5 Q.B.D. 518. The pursuers' claim lay against the company, not against the defenders. The money was the property of the company, and they could do what they liked with it unless it were specifically earmarked, which it was not. It could have been arrested by a creditor of the company while in their account, and was part of their assets in bankruptcy. That being so, the defenders were not liable.

LORD PRESIDENT—In this case the pursuers ask decree now for the sum of £600 sterling, and I think they are entitled to have that decree, for I can find no averments in this record which require to be supported by parole evidence in order to establish the pursuers' case. In my opinion they require no evidence in support of the averments in order to secure a decree for £600. On the other hand MR Normand, who has said everything that could be said on behalf of the defenders, has been unable to point us to any averment in the defences which, if established by evidence, would enable him to resist decree for £600.

The pursuers' case, stated shortly, is this —that they transmitted to this country a certain sum of money to be applied by the company, of which the defenders are the only shareholders, to a specific purpose, that the money was received but that it was not applied to that purpose, but, on the contrary, that the defenders, or at all events one of the defenders, with the full knowledge and assent of the other, helped himself to the cash.

The facts are these—[*After narrating the facts ut supra his Lordship proceeded*] — It is not said in this record that M'Dougall, who was sole shareholder along with Downie, and sole director of the company along with Downie, was unaware of, or disapproved of, what was done. He does not, in short, separate himself from Downie. The defence given in is one given in for both defenders, and these are the facts plainly set forth in this record which are admitted and which require no parole proof to support them. There is, I think, a clear and unqualified admission on record for both defenders of misappropriation of this money.

I am of opinion that inasmuch as there is a question of fact raised with regard to the balance of the money, mainly in connection with a bill which is set out in the 5th article of the condescendence and the 5th answer, we cannot give decree for the full sum which Downie drew from the bank and applied to his own purposes. But it appears to me that we are in a position now to give decree for the £600 which is claimed, without any parole evidence being required in support of the claim.

I therefore come to the conclusion that the Lord Ordinary's interlocutor cannot be upheld, and that we should now give decree for £600 in favour of the pursuers, and *quoad ultra* affirm the Lord Ordinary's interlocutor allowing a proof.

LORD JOHNSTON—I think that this case depends entirely upon the original contract between the parties as to the mode of conducting the credit out of which the whole question arises. On 1st April 1912 the defenders, through their managing director George Downie, wrote authorising the pursuers to draw upon them at ninety days' sight for any sums, but not exceeding in all £10,000, provided that no more than £1000 should be drawn for by any one mail, and adding "and that you" (pursuers) "send us" (the company) "cover for the drafts so drawn in first-class sight drafts on London, said sight drafts to reach us at least seven days before the maturity of the drafts drawn by you under this credit."

What followed was that a certain series of bills to the amount of £1000 were drawn, were accepted, and fell due on a certain date in August 1912; that first-class sight drafts on London were by letter of 17th July forwarded and were received in London, but they were received a day or two too late to comply with the condition that they should "reach us at least seven days before the maturity" of the bills which had to be met.

Now it seems to me that at that point the defenders were entitled to say, "We will dishonour these bills because you have not complied with your obligation of putting us in funds to take them up." But if they had done that I cannot conceive that they could by any possibility have retained the drafts and placed the proceeds to their credit. What they did was neither to take up the bills nor to return the drafts. They therefore retained the money which had been sent to them for a definite purpose, and did not apply it to that purpose. At that stage they were considerably overdrawn with the Bank of Scotland in Edinburgh, and what they did was to open a new account with another bank, namely, the North of Scotland and Town and County Bank. They had no account there. They had no transactions with that bank before, but they opened an account by placing to their credit the £1000 which belonged to the pursuers. I admit that at first they apparently intended to take up the bills, because they sent their cheque for £600 upon the North of Scotland and Town and County Bank to London *pro tanto* for that purpose. But then they sent it too late. The bills had been dishonoured, they could not be called in, and the proceeds of their cheque

were returned to them and replaced in their account.

What is complained of is that, at that state of matters, Mr Downie, the defenders' managing director, drew for his own purpose upon an account which he knew contained nothing but the proceeds of drafts that had been sent to his company under a definite contract to be applied to a definite purpose, and which had not been so applied. I cannot hold that that was anything other than misappropriating property which he had no right to touch.

I wish to distinguish this case from any of the cases quoted to us. This is technically a registered company, but it is one of those private companies which it is now possible to create, consisting of two gentlemen who themselves are the directors, and themselves are the shareholders, and therefore themselves are the company. I cannot regard this sort of company as similar to those with which the cases to which we were referred were concerned. The directors of an ordinary limited public company cannot of course know the whole details of the company's banking accounts. I regard this case as one in which there is a company only in name, two individuals knowing everything that is done in the company, and these gentlemen knowing in particular that the only sum that they had to draw upon was a sum placed in their hands for a definite purpose and under a definite obligation, and they actively and passively allowed it to be appropriated to the private purposes of one of them.

Under these circumstances I agree in the conclusion to which your Lordship has come.

LORD MACKENZIE — I am of the same opinion as your Lordships, and think that the pursuers are entitled to decree *de plano* for the sum of £600. I do so upon the ground that it sufficiently appears from the papers before us that the defenders have been guilty of a breach of trust, and not merely of a breach of contract.

I think that the fund of £1000, of which the £600 forms a part, was received by the defenders Mr Downie and Mr M'Dougall, as trustees, in order that it might be applied to a specific purpose. That purpose is defined by the letters of the 1st April 1912 and the 17th July 1912, in the latter of which it is distinctly stated that "the money is sent to meet our drafts." There is sufficient in the print to show that not only did the defenders not apply it to the purpose for which it was sent, but also that they never proposed or offered to return the draft which had been sent. Therefore the nature of the claim in the present case is that the pursuers come forward and say, pointing to the admission of the receipt by Mr Downie of two sums of £250 and £500, "that is our money."

The money never became the property of the defenders, and the pursuers are entitled to vindicate it and get a decree against the defenders personally for repayment. I am unable to see anything stated upon the defenders' side of the record which, if proved, would entitle them to resist the present demand. Further, I was unable from the very able statement of Mr Normand to gather any fact, whether appearing on the record or not, which if proved would avail his clients in the very least.

It was pointed out that there was a distinction between the position of Mr M'Dougall and that of Mr Downie, but there is really no difference between them in regard to this matter. The person who actually received the money of which Mr M'Dougall was a trustee was Mr Downie, but nowhere on the record does Mr M'Dougall dissociate himself from anything Mr Downie did.

Accordingly, I think that the two defenders are liable jointly and severally for the money which was misappropriated, and therefore I agree with the judgment proposed by your Lordships.

LORD SKERRINGTON—I concur.

The Court recalled the Lord Ordinary's interlocutor; *hoc statu* decerned against the defenders jointly and severally for payment to the pursuers of the sum of £600, being a portion of the sum concluded for; *quoad ultra* before answer allowed to the parties a proof of their respective averments on record, and remitted to the Lord Ordinary to take the proof and to proceed as accords."

Counsel for Pursuers—Constable, K.C.—Aitchison. Agent—E. I. Findlay, S.S.C.

Counsel for Defenders — Cooper, K.C. — Normand. Agent — Andrew M'Dougall, Solicitor.

HIGH COURT OF JUSTICIARY.

Saturday, November 8.

(Before the Lord Justice-General, Lord Johnston, Lord Mackenzie, and Lord Skerrington.)

WILSON *v.* FLEMING.

Justiciary Cases—Complaint—Food and Drugs Act—Relevancy—Specification—Milk—Charge Libelled against Employer Personally without Mention of Servant who actually Sold the Milk—Sale of Food and Drugs Act 1875 (38 *and* 39 *Vict. cap.* 63), *sec.* 6.

The servant of a milkman, while in charge of his employer's cart, supplied to an inspector of food and drugs a quantity of milk which on analysis was found to be deficient in milk fat.

A complaint charged the milkman with selling to the complainer, on a date and at a place specified, milk which was not genuine, in respect that it contained less than 3 per cent. of milk fat.

Held (*diss.* Lord Johnston) that the complaint was irrelevant and wanting in specification, in respect that it did not give fair notice to the accused that the sale in question was effected by his servant.