The LORD JUSTICE-CLERK and LORD GUTHRIE concurred.

The Court answered the question in the negative.

Counsel for the First and Fourth Parties—Cree, K.C.—Henderson. Agents—Webster, Will, & Company, W.S.

Counsel for the Second Parties—Moncrieff, K.C.—Maconochie. Agents—Fraser, Stoddart, & Ballingall, W.S.

Counsel for the Third Parties—Sandeman, K.C.—Robertson. Agents—Mylne & Campbell, W.S.

Wednesday, May 31.

SECOND DIVISION.

BURRELL *v.* BURRELL'S TRUSTEES AND OTHERS.

Compensation—Concursus debiti et crediti—Decree for Expenses in Favour of Several Defenders and Legacy Due by One of the Defenders.

A complainer brought a suspension of a charge upon a decree for expenses in favour of the defenders in an action in which he had been pursuer. The decree was in favour of a large number of defenders including a trust. He sought suspension on the ground that the trust, who he averred were the real defenders, the others being merely nominal, were owing him a legacy of larger amount; or, failing that, suspension of the decree so far as the trust was interested.

Held that there was no *concursus debiti et crediti*, and note of suspension *refused*.

Henry Burrell, *complainer*, brought against George Burrell, shipowner, and another, the trustees of the late Mrs Isabella Guthrie or Burrell, *respondents*, a note of suspension of a charge to make payment of £183, 12s. 8d., being the taxed amount of expenses of process in decrees of 11th March 1914 and 11th March 1915, together with £1, 15s. dues of extract.

The complainer described the charge as being at the instance of the respondents, whereas it proceeded at the instance of (*a*) the said trustees, (*b*) William Burrell, shipowner, Glasgow, who was one of the trustees, as an individual, and Mrs C. Mitchell or Burrell, his wife, and (*c*) ten steamship companies in whose favour the decrees for expenses had gone out and who had been defenders in an action brought against them by the complainer (see 52 S.L.R. 312). The complainer however averred—"Stat. II . . . Explained that the respondents, who were the parties chiefly interested in the said action, assumed the entire control of the defence therein; that although defences were lodged nominally on behalf of all the defenders called, this was done on the instructions of the respondents alone; that during the whole course of the litigation they alone continued to be consulted by and gave instructions to the law-agents who conducted the defence; that no part of the expenses for which the decree has been extracted were incurred by the defenders other than the respondents, and that the latter alone are entitled to payment." It was admitted that under the trust the complainer had been left a legacy of £2500, and had only so far received £1250.

The complainer pleaded, *inter alia*—"(3) In any event, the respondents being indebted and resting-owing to the complainer in a sum largely in excess of the sums charged for, the charge complained of is nimious and oppressive, and should be suspended."

The respondents pleaded, *inter alia*—"(6) There being no *concursus debiti et crediti* compensation is inadmissible, and the note should therefore be refused."

On 7th December 1915 the Lord Ordinary (HUNTER) repelled the reasons of suspension and found the warrants and charge orderly proceeded.

The complainer reclaimed, and argued—The legacy due by the trustees to the complainer was a liquid debt which he was entitled to set off against their claim under this decree. A proof at least should be allowed of the complainer's averments that the respondents were the real defenders in the action, and that they alone had incurred the expenses. And, in any event, the complainer was entitled to set off his claim to the legacy against whatever part of the joint-right of the defenders in the decree was, in point of fact, in the trustees—*Harvey* v. *Muir*, 1843, 5 D. 1113; Bell's Prins., sec. 52.

Argued for the respondents—The demand for a proof was an attempt by parole evidence to get into the question of indebtedness and contradict the terms of the decree. The principle of compensation did not apply where the debt to be set off was due by one of several creditors—Lindley on Partnership (8th ed.), p. 350; Bell's Comm. ii, 553. There was in such case no *concursus debiti et crediti*. The Court referred to *Fowler* v. *Brown*, 53 S.L.R. 416.

LORD JUSTICE-CLERK—[*After pointing out that the charge was described as being given only by Mrs Burrell's trustees, whereas it was given at the instance of the other parties also, and that this was sufficient ground for refusing the note*]—I am averse, however, after the careful argument we have had, from dealing with this case merely on what may be called technicalities. The Lord Ordinary seems to have proceeded upon the view that there was no proper *concursus* between the two debts. Apparently there is no authority in Scotland dealing with the question before us, namely, whether a plea of compensation is applicable where on the one hand there is a joint debt and on the other an individual debt. It is, of course, well settled in Scots law that a debt due by the individual partners of a firm cannot be set off against a debt due to the firm; but that affords little help here, seeing that the firm is recognised

as being a separate *persona*. In England, however, where that view does not hold, it is settled, as is shown by the passage cited from Lord Lindley's book on Partnership, that such a *concursus* would not be regarded as sufficient to found a plea of compensation. Now, the reasons given for that rule by Lord Lindley are, in my opinion, equally applicable in Scotland.

Accordingly in my view—on the merits of this case, and apart from the technical objections I have referred to—there is a failure here of the necessary *concursus debiti et crediti*, and the sixth plea-in-law for the respondents is well founded. We shall therefore refuse the note.

LORD DUNDAS, LORD SALVESEN, and LORD GUTHRIE concurred.

The Court refused the reclaiming note and adhered.

Counsel for Complainer — Solicitor-General (Morison, K.C.) — D. Jamieson. Agents—Dove, Lockhart, & Smart, S.S.C.

Counsel for Respondents—A. O. M. Mackenzie, K.C.—C. H. Brown. Agents—Webster, Will, & Company, W.S.

Friday, June 2.

FIRST DIVISION.

[Sheriff Court at Perth.

BARLASS *v.* BARLASS'S TRUSTEES.

Trust — Husband and Wife — Aliment — Interim Aliment — Right of Wife to Award of Immediate Aliment after Husband's Death.

A widow, who had no separate estate, brought an action against her husband's trustees, within six months of her husband's death, concluding for a sum for interim aliment for the next term after the husband's death. There was considerable debt on the trust property, but there was no reason to believe the trust was insolvent, and no creditor was pressing. *Held* (*diss.* Lord Skerrington) that the widow was entitled to decree and was not bound to wait until the expiry of six months.

In January 1916 Mrs Helen Mackie or Kirk or Barlass, widow of James Barlass, ironmonger, Perth, who died on 5th November 1915, *pursuer*, brought an action in the Sheriff Court at Perth against Alexander Barlass and others, trustees acting under her husband's trust-disposition and settlement, *defenders*, for payment "(first) of the sum of twenty-six pounds sterling for aliment payable as at the term of Martinmas last for the half-year immediately following, and (second) the sum of twenty pounds for mournings."

The *facts* of the case appear from the note of the Sheriff-Substitute (SYM), who on 14th February 1916 found "that the deceased Mr Barlass died survived by his wife, and leaving a small moveable estate and also heritable estate which is burdened with bonds; that he left a settlement under which he made no provision for his wife, and that she is claiming terce and *jus relictæ*, but that it is still impossible to have these correctly adjusted: Finds in law that his said wife is entitled to a reasonable sum for mournings and to aliment out of the estate until her legal rights can be adjusted: Repels the defences, grants decree against the defenders for the sum of £14 in respect of mournings, and decree at the rate of £1 per week beginning from the death of Mr Barlass, and continuing until the adjustment of the said legal rights or until further orders of Court."

Note.—"On record there is not much difference as to material facts, and the parties wisely endeavoured to put the Court in possession of facts sufficient to make proof unnecessary. Mr Barlass married a second time late in life. He was unhappy in this marriage, and separated from his wife, and allowed her £1 per week. It was found when he died that he had left her nothing, and that he had parted, or professed to have parted, with a good business which he carried on in Perth. But he left a small moveable estate and considerable heritage. Though there is debt on the latter the appearance of the estate *prima facie* is that there will be a considerable surplus, and it is clear that the income of this estate must have supported the spouses when living apart even if the business was gone. In such a state of matters the widow is entitled to support until the trustees of Mr Barlass have had reasonable time to go into his affairs and settle as to her legal rights. The plea that interim aliment and mournings cannot be claimed for many months after the death is almost ludicrous. The adviser of the trustees is much alarmed by the case of *The Heritable Securities Investment Association, Limited* v. *Miller's Trustees*, 1893, 20 R. 675, 30 S.L.R. 354, the doctrine of which the Sheriff-Substitute had to follow in a recent dispute in this Court. There is no doubt that in that instance the doctrine pressed hardly on a respectable man who, being a trustee, had paid away to beneficiaries money which really belonged to creditors. But then mournings are part of the funeral expenses, and the widow has a right to be kept in life till the estate is fully investigated. That adviser ought also to understand that the decree of a competent court will protect the trustees from being thought to have rashly paid away money which—taking a very timid view of the prospects of the estate—they say might have to be kept for creditors."

On appeal the Sheriff (JOHNSTON) on 27th March 1916 adhered.

Note.—"There can be no doubt of the soundness of the general principles contended for by defenders that beneficiaries cannot claim payment until creditors are satisfied and that testamentary representatives are not to be harassed by actions within six months. But these principles are not applicable in the case of such claims as are here made. They are claims that