The other point is the age of the boy; but it is shown that it is usual for boys of this age to be set to this kind of work. On these grounds I think the judgment should be affirmed.

LORD RUTHERFURD CLARK concurred.

The Court refused the appeal.

Counsel for Appellant—Sym. Agent—Thomas M'Naught, S.S.C.
Counsel for Respondents — R. Johnstone—M'Kechnie. Agents—Smith & Mason, S.S.C.

Thursday, November 2.

SECOND DIVISION.

[Sheriff of Argyll.

RALSTON *v.* MAXTONE (M'INTYRE'S FACTOR).

Trust—Testamentary Trust—Managing Trustee—Power to Borrow Money qua *Trustee*—In rem versum—*Relevancy.*

M., one of two testamentary trustees, had been appointed by trust-deed manager of a farm the lease of which formed part of the trust-estate. In the course of his management he had been in the custom of dealing with R. for goods, giving in return farm produce, an account-current being kept between them. R., at the request of M., accepted a bill drawn by the latter for £300, which was discounted for him by a bank. The bill bore, in pencil, under the drawer's signature, "Trustee of M. M'Intyre," and the indorsation likewise bore, "Managing trustee of M. M'Intyre." Both trustees having been shortly thereafter removed by the Court, and a judicial factor appointed, R. sued him for the amount in the bill. *Held* that the action falling to be regarded as properly one for money lent, failed, because (1) M. had no power under the trust-deed, and no implied power as a trustee or as manager of the farm for the trustees, to borrow money; and (2) the pursuer had made no relevant averment on record that the trust-estate was *lucratus* by the transaction.

Malcolm M'Intyre, tenant of the farm of Kilkeddan, Campbeltown, died in 1878, leaving a last will and testament by which he conveyed his whole estate, real and personal, to John M'Intyre, farmer, North Moile, and Lachlan M'Intyre, agent of the Royal Bank at Campbeltown, in trust for certain purposes, and more particularly he directed his trustees to carry on the farm of Kilkeddan till the expiry of the then current lease. He further directed that Lachlan M'Intyre should have the management of the farm. Both trustees accepted office, and Lachlan M'Intyre entered on the management of the farm, and continued the management till January 1881, when his affairs having become embarrassed he executed a trust-deed for behoof of his creditors and left the country. John M'Intyre never took any part in the management of the estate. In the course of the year 1881 both the M'Intyres were removed by the Court from the office of trustee on the estate, and the defender D. M. Maxtone was appointed judicial factor thereon.

The present action was raised against him as such judicial factor in the Sheriff Court of Argyllshire at Campbeltown, by John Ralston, grocer in Campbeltown, for the sum of £275, 10s. 1d. alleged to be due to the pursuer in the circumstances thus explained in the note of the Sheriff-Substitute:—"During Lachlan's management he was in the habit of dealing with Ralston for the necessary supplies of seed and such-like for the farm of Kilkeddan, and Ralston, on the other hand, was in the habit of buying the farm produce from M'Intyre. Their dealings, so far as appears, were carried on exclusively on the footing of M'Intyre's trusteeship, as is shown by the heading of Ralston's account, of which a copy is produced.

"In December 1880, at the request of M'Intyre, Ralston accepted a bill for £300, which was discounted by the Royal Bank. The bill is produced. On its face there is a marking in pencil after Lachlan M'Intyre's signature, 'Trustee of M. M'Intyre,' and it is indorsed in ink 'Lach. M'Intyre, managing trustee of M. M'Intyre, Kilkeddan.' There is of course nothing to show when these markings were put upon the bill, nor whether Ralston ever saw or was cognisant of them, but there is also produced a holograph writing by Lachlan M'Intyre whereby he binds himself 'to have goods from the farm of Kilkeddan in his (Ralston's) hands to meet the bill when due, and if not quite sufficient goods, then money.' This document is of even date with the bill. Its authenticity is not denied, and the only doubt thrown upon it is in Answer 4 for the defender, 'Not known that it was granted of the date it bears.'

"The bill became due, and not having been provided for by M'Intyre, was retired by Ralston, who now seeks repayment from the trust-estate. This claim is resisted by the defender on the ground that the bill was drawn by M'Intyre, and accepted by Ralston, for the accommodation of the former in his private capacity, and that the trust-estate is not liable."

The pursuer pleaded—"(1) The pursuer having (as above explained) undertaken the obligation on the bill to the said Lachlan M'Intyre in his character as trustee foresaid, the trust-estate is liable in the sums concluded for."

The defender pleaded, *inter alia*—"(1) The bill referred to having been drawn by the said Lachlan M'Intyre as an individual, and so accepted by the pursuer, no liability attaches to the trust-estate of the said Malcolm M'Intyre therefor. (2) The contents of said bill having been applied by the said Lachlan M'Intyre to his own purposes, and not for the benefit of said trust-estate, the pursuer is not entitled to the decree sought. (3) That the contents of said bill were applied for the benefit of the trust-estate can be proved only by the writ or oath of the defender."

The Sheriff-Substitute (DUNDAS) found the pursuer entitled to decree as craved.

"*Note*—[*After the narrative above given*]—The contention of the defender appears to the Sheriff-Substitute to be not well founded. It seems to him quite clear that the parties had all along been dealing on the footing of M'Intyre's

trusteeship, and that Ralston when he accepted the bill did all that a prudent man could do in taking from Mr M'Intyre the holograph acknowledgment above referred to, of the genuineness of which the Sheriff-Substitute feels no doubt. It certainly appears to him that the defender's second plea-in-law, to the effect that M'Intyre applied the contents of the bill to his own purposes, is wholly irrelevant. If he as trustee obtained money from Ralston for the purposes of the trust, and then put the money in his own pocket, how can Ralston be held responsible for this dishonesty? He was dealing with a man who at the time was supposed to be honest, and who held a situation of trust, and it appears to the Sheriff-Substitute that Ralston was quite entitled to accept his word even without the written guarantee which was given, and there can be no question that M'Intyre had ample power to pledge the credit of the trust-estate.

"The third plea-in-law also seems to the Sheriff-Substitute to be irrelevant, for the reason already given, that the bill was accepted by Ralston in *bona fide*, and that he had neither the right nor the power to trace the money after it came into M'Intyre's hands.

"The other pleas-in-law seem to the Sheriff-Substitute to be also founded on a misconception. Ralston does not in the least dispute his liability to take up the bill; on the contrary, he has retired it long ago. His case is, that he advanced money to the trust-estate which was to be paid back in three months' time either in goods or in cash, and as this was not done his claim is still unsatisfied. He bought goods deliverable in three months, and paid for them in advance, and he is clearly entitled either to his money or the goods. If the Sheriff-Substitute is right in the view he takes, it does not in the least signify in what form Ralston paid the money, whether it was by bill or in bank-notes, nor does it matter to him whether M'Intyre when he got the money embezzled it or applied it to its legitimate purpose.

"On the whole matter the Sheriff-Substitute is strongly of opinion that M'Intyre pledged the credit of the trust-estate, as he had a right to do, and that Ralston having advanced money on the faith of that credit, is entitled to repayment in full, not only of his actual advance, but also of all expenses to which he has been put by M'Intyre's failure to keep his engagement."

The defender appealed to the Sheriff (Forbes Irvine), who found that the bill was drawn by M'Intyre as an individual, and not as trustee, and to that extent sustained the pleas of the defender, but allowed a proof by writ or oath of the defender that the proceeds of the bill were applied to the benefit of the trust, and remitted the cause to the Sheriff-Substitute for further procedure.

He added the following note:—"The main question here at issue is, whether the bill was drawn by Lachlan M'Intyre in his individual capacity or as managing trustee on the farm of Kilkeddan?

"The law on this subject is clearly expressed by Professor Bell, Commentaries, 3, 2, section 3, edit. by M'Laren, vol. i. p. 421—'When one draws a bill in a representative character as factor or otherwise, he must, in order to be free from personal liability, limit his draft to that character, for the law holds that the act of drawing the bill affords legal evidence of an obligation against the drawer in his own person, and that recourse according to a general rule, and without distinction, must be competent upon all bills which do not *ex facie* bear the exception.'

"The law is laid down in terms equally distinct in Thomson on Bills, Wilson's ed., pp. 146 and 154.

"Reference is made to the decisions in *Connell* v. *M'Lelland*, 1782, M. 1485; *Douglas* v. *Lord Dunmore*, 1800, M. App. Bill of Exch. No. 11; *Webster* v. *M'Calman*, June 3, 1848, 10 D. 1133; *Chiene* v. *Western Bank*, July 20, 1848, 10 D. 1523.

"These authorities, and others that might be noticed, seem amply to bear out the general principle that where a person signs a bill as drawer, indorser, or acceptor he will not be exempt from personal liability by reason only that he adds words to his signature describing himself as agent for a principal named or unnamed, or as signing in a representative character; the repudiation of liability must be express.

"If these propositions are well founded, they seem to be decisive of the present question. Neither (1) the pencil marking on the face of the bill, of which the date and the writer are alike uncertain, nor (2) the indorsation, which at best is merely descriptive of the indorser's representative character, nor (3) the document, which is entirely apart from and extraneous to the bill, nor indeed all these taken together, can, in the opinion of the Sheriff, have the effect of altering the exclusively personal nature of the liability constituted by the bill itself.

"It appears, however, to the Sheriff that it is still competent to the pursuer to establish *habili modo* that the proceeds of the bill were wholly or in part applied for the purposes of the trust, and a proof to that effect has therefore been allowed."

On the case coming again before the Sheriff-Substitute the pursuer lodged a minute declining to proceed with proof by writ or oath, in respect whereof his Lordship assoilzied the defender from the conclusions of the action.

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

The arguments of parties appear from the opinions of the Judges.

Authorities—1 Bell's Comm. 509; *Edmunds* v. *Bushell*, 1 L.R., Q.B. 97; *Haldane* v. *Speirs*, March 7, 1870, 10 Macph. 537; *Sinclair* v. *Wallace*, June 4, 1880, 7 R. 874; *Cameron* v. *Young*, June 2, 1871, 9 Macph. 786.

At advising—

Lord Young—I think this is a simple case, but I do not think it has been rightly apprehended in the Sheriff Court, clearly not by the Sheriff-Substitute, and I venture to think not by the Sheriff-Principal either. Both learned Judges seem to have considered it an action on a bill of exchange. Now, it is not an action on a bill of exchange. A bill of exchange occurs, and the fact that it was granted and was accepted may be of more or less importance, as such facts are, in cases quite foreign to bills of exchange. The bill here was drawn by the predecessor of the defender, who was trustee and manager of the farm, upon and accepted by the pursuer, and bears, like most bills of exchange, to be for value received. Now,

a bill is a document of debt against the acceptor, who by accepting it acknowledges his indebtedness to the drawer, and binds himself to pay the amount there mentioned; the acceptance makes it a debt against him. We have a variety of rules which exclude certain objections and defences to an action for implement of that obligation by the acceptor. Here the proper debtor paid the bill when it fell due, and the bill having completely answered its purpose—having been paid by the proper debtor, viz., the acceptor—was at an end as a document of debt, and no action could be founded on it. The pursuer explains that his purpose was to raise £300 which he agreed to lend to M'Intyre. If he lent it to M'Intyre, it does not signify how he raised it. If he had it in his repositories, he might have handed him the cash. If he had it in the bank, he might have given him a cheque. But the means he takes is by bill. He pledges his credit, and so he raises his money to lend. Now the way the money is raised is no matter to us. This action is for money lent to M'Intyre, but it is an action laid against him as factor on a trust-estate, and it is sought to be recovered from him on allegations that it was borrowed by M'Intyre as one of two trustees on the estate on which the defender is now judicial factor, and that as such trustee he was managing a farm the lease of which forms part of the trust-estate, and, finally, that he represented that he wanted the money for the uses of the farm. Now, as an action against the trust-estate the case fails altogether, for, in the first place, I think there was no power in the trustees to borrow money. As a general rule, trustees have no such power unless it is expressed in the trust-deed, except in certain circumstances, which do not occur here. In the second place, the trustees did not borrow, and it is not shown that the trust-estate had anything to do with the matter at all. Therefore as for money lent on the trust-estate the action fails, because the trustees had no power to borrow, and as a matter of fact did not borrow. But it is alleged that the proceeds were applied to the purposes of the farm. I think that is not a sufficient averment as a ground of action for recovery of this £300. I do not say whether or not averments might have been made as to this money having been *in rem versum* of the trust-estate—that it was at the time required for certain trust purposes, and was supplied by the pursuer for these purposes, and was applied to them by the defender. On this I give no opinion. It is sufficient that no such case is presented to us. Therefore, although I think the Sheriffs have decided the case on erroneous grounds, I agree that the result is the same—that the defender should be assoilzied or the action dismissed.

Lord Craighill—I am of the same opinion. In this case the pursuer sues the trust-estate; the ground of action is the bill and holograph obligation, which is stated to explain the true nature of the action. But where a trust-estate is sought to be rendered liable through the actings of trustees, the first thing necessary is to ascertain the power of the trustees. The actings of anyone who acts for a trust must be authorised by the trust-deed. To make this a debt against the trust-estate the trustees must have had power to borrow. If both trustees had been parties to the loan we might have been obliged to inquire more closely into this transaction. But in this case that which was done was done by one of them only, and he alone could not bind the trust-estate. But it is answered that he was appointed in the trust-deed manager of the farm, and that the power to borrow money for the purposes of the farm is incidental to that position; but it does not seem to me that that gives him power to borrow where he had it not as a trustee. I am therefore of opinion that what was done was not authorised by the trust-deed, and the trust does not therefore come under any obligation; and, secondly, that this was nothing more than a personal obligation undertaken by M'Intyre. Lastly, it is stated that the trust-estate was benefited by the loan. I think that argument is not warranted by the circumstances. If such a relevant averment had been made on record there might be some question as to whether the case should be remitted to probation, but there is no relevant averment before us on that matter.

Lord Rutherfurd Clark—I am of the same opinion. I have no doubt that M'Intyre did borrow this money on account of the trust-estate, and that Ralston lent it in the belief that he was binding the trust-estate. But I am very clear that the trustees had no power to borrow money and bind the trust-estate. The theory that there was such a power because one of the trustees was managing a farm which formed part of the trust-estate is one to which I cannot subscribe. As to the other ground on which the pursuer rests his case—that the money lent was applied to the benefit of the trust-estate—I do not doubt that a case might have been made against it if it had been averred that the estate was *lucratus* by the transaction, but I do not find any such ground averred in the case. It is said, however, that this particular sum was applied in fulfilment of trust obligations. But that might be so without the trust-estate being liable. The necessity of borrowing was due to the fact that the trustee required money for the management of the farm. Now, I am clearly of opinion that though some of the money may have been applied to the obligations of the trust-estate, there is no sufficient averment to found a case against the defender.

Lord Justice-Clerk—I am of opinion that the case fails altogether, but not on the ground assumed in the Court below. There is no doubt that the money in the bill which was accepted by Ralston was, when discounted, received by M'Intyre, and therefore, apart from any question as to the form of the bill, it is clear that he got the money. The next question is, whether there was an obligation on the trust-estate constituted by the bill, and if so, whether M'Intyre as trustee had power to enter into such a transaction to the effect of binding the trust-estate, or whether the obligation was a merely personal one. I think it is quite clear that M'Intyre did not borrow for the trust-estate, but for his own special purposes, and that even if he did intend to bind the estate he had no power as a trustee to do so. But it is sought to make a case against the estate of a special application of the money to the purposes of the trust-estate. But in order to do so it is necessary to have specific averments to that

effect, such as payment of taxes or the like, on record, and I am of opinion that there is no relevant averment of the kind here.

The Court recalled all the interlocutors pronounced in the Sheriff Court, and of new assoilzied the defender.

Counsel for Pursuer (Appellant)—Mackintosh—Lorimer. Agents — Hamilton, Kinnear, & Beatson, W.S.

Counsel for Defender (Respondent)—Hon. H. J. Moncreiff. Agents—Murray, Beith, & Murray, W.S.

Friday, November 3.

SECOND DIVISION.

[Lord Adam, Ordinary.

KINNEAR *v.* KINNEAR, *et e contra.*

Husband and Wife—Divorce for Desertion—Separation and Aliment—Wilful and Malicious Desertion—Reasonable Cause for Absence of Spouse said to be Guilty of Desertion.

In an action of divorce raised by a husband on the ground of his wife's wilful and malicious desertion, the Court, on a consideration of the proof, (*dub.* Lord Young) *repelled* a plea to the effect that the wife had reasonable excuse arising out of her husband's cruelty for remaining apart from him, and pronounced decree of divorce; and in a counter action of separation and aliment at the instance of the wife, grounded on averments similar to those which constituted her defence in the action for divorce, *dismissed* the action on the ground that the alleged cruelty had not been established.

The first of these two actions was an action of divorce raised by Thomas Kinnear, sanitary inspector for the burgh of Dundee, against his wife Helen Leslie or Kinnear, on the ground that she had been guilty of wilful and malicious non-adherence to and desertion of him without a reasonable cause for four years. The defender admitted that she had been absent for more than four years from her husband, but averred that her absence was caused by terror occasioned by the gross cruelty of her husband, which had rendered her afraid to live with him. She condescended on various alleged threats and acts of cruelty on his part towards her.

She pleaded, *inter alia*—"The pursuer having treated the defender with gross cruelty, and she having left him on that account, the action is groundless and untenable."

Mrs Kinnear raised a counter action of separation and aliment against her husband, in which she made the same allegations of cruel threatening conduct on the part of her husband which constituted her defence in the action of divorce.

A proof was led in the action of separation and aliment, which by agreement of parties was held as also applicable to the action of divorce. The following facts were elicited by the evidence:—The parties were married in 1865. The husband was at that time a policeman in Dundee, and the parties lived together there, with the exception of certain short absences of the wife in consequence of quarrels between them, till October 1877, when they finally separated as after mentioned. Five children were born during that period. The husband's position in Dundee improved during the subsistence of the marriage, and at the time of these actions he was sanitary inspector of the burgh of Dundee, and had an annual income of about £170. The wife, on the other hand, after the marriage contracted drunken habits, spending the housekeeping money on drink. She also became untidy and lazy, and her husband had frequent occasion to complain of her habit of smoking and use of bad language before her children. The married life of the parties in consequence became unhappy very soon after the marriage, the husband upbraiding the wife, and quarrelling with her on account of her bad habits, and the wife neglecting her husband and her five children. In September 1866, on the occasion of a quarrel about the husband's dinner, she left him, but he induced her shortly after to return to her home. She again left him in 1873 on the occasion of a quarrel about her habits of drinking, but was taken home again the next day. In September 1874 she again left her husband in consequence of a dispute occasioned by her drinking habits, and on this occasion she took away with her the four children then existing of the marriage. She removed with them to Forfar. On this occasion legal proceedings were threatened against her husband for aliment for her and the children. He at once wrote expressing his anxiety to receive home his children, and stating that his wife was also welcome to return. Three of the children were then sent home to him, and after a time Kinnear came to Forfar and took away the youngest also. Thereafter, in consequence of a message from her husband relating to the health of one of her children, Mrs Kinnear returned to her husband's house in Dundee, promising to mend her ways. For a short time matters went well, but afterwards she again fell into bad company, and returned to her drunken habits. In 1877, after a quarrel relating to the pawning of articles by her, and particularly as to some sheets which were amissing, she left him for the last time. He made this note in his diary—"Tuesday, 2d Oct. 1877.—This day my wife deserted me of her own accord." Two months after he went to Forfar and offered to take her back, but she refused to come. He denied in his evidence that he had ever kicked her or struck her, or had charged her with infidelity, and deponed that he had been always prepared to take her back if she had been willing to come. On this point, however, he deponed in cross-examination as follows:—"I went to Forfar to bring her back two months after she left. She did not give me time to tell her that, because she ran out of the house. When I saw her two months afterwards she was perhaps 8 or 10 yards from me. Since then I have driven through Forfar perhaps three times a-year to see my brother, who lives some distance beyond the town. On these occasions I never called to see my wife. From the reports which I got latterly about her conduct I did not think I would be justified in going to see her. The second time I was at Smith's house I got information concerning a drinking bout which she had had with the foreman-tenter on a Saturday night. I wrote to a friend asking him to make inquiry, and he wrote