Tuesday, March 20.

FIRST DIVISION.

(Without the Lord President.)

PATRICK AND ANOTHER (SMITH'S TRUSTEES) *v.* SMITH.

Partnership — Delegation — Discharge — Accession to Trust-Deed — Liability of Retired Partner for Debts Taken Over by New Firm—Partnership Act 1890 (53 *and* 54 *Vict. cap.* 39), *sec.* 17, *sub-sec.* 3.

Under the trust-deed and settlement of A, a partner in the firm of A & Co., B and C, two of the three remaining partners, became the only trustees. Under the trust-deed the trustees had power to allow the truster's capital in the business to remain as a loan to the firm, and the amount of this capital was ascertained and continued in the business, although no formal obligation for it was ever undertaken by the partners. D, the remaining partner, afterwards retired under an arrangement by which B & C paid him £9000 for his interest, undertook to relieve him of all debts, and exhibit discharges therefor, and took over the assets. The new firm, composed of B & C, paid one-half year's interest on the debt due to A's trustees, and about ten months after D's retirement, B & C as trustees granted in favour of the old firm and of D a discharge of the debt due to the trust. One month afterwards the firm of A & Co. became insolvent, and granted a trust-deed for behoof of their creditors. B and C resigned their position on A's trust, and new trustees were appointed, who ranked on the firm's estate and received a dividend. They then brought an action against D concluding for reduction of the discharge and for payment of the balance of the debt. *Held* (*reversing* judgment of Lord Kincairney, Ordinary) that the pursuers were entitled to decree, in respect (1) that payment of interest by the new firm did not operate as novation or delegation of the debt, or discharge the old firm under the provisions of section 17, sub-section 3 of the Partnership Act 1890; (2) that in the circumstances the discharge was a breach of trust on the part of B & C, from which D, who had given no consideration for it, could not profit; and (3) (following *Morton's Trustees* v. *Robertson's Judicial Factor*, November 22, 1892, 20 R. 72, and distinguishing *Scarf* v. *Jardine*, June 13, 1882, 7 App. Cas. 345) that the trustees did not discharge D by ranking on the estate of the new firm.

Alexander Smith junior, a partner in the firm of A. & W. Smith & Company, engineers, Eglinton Engine Works, Glasgow, died on 7th December 1893, leaving a trust-disposition and settlement by which he appointed his widow (who died soon afterwards), and William Smith and Hugh Osborne Smith, two of the partners of the firm of A. & W. Smith & Company, to be his trustees.

The trust-deed contained the following provisions:—"I hereby specially authorise my trustees to allow my share of the capital at my death in the concern of A. & W. Smith & Company, engineers, Eglinton Engine Works, Glasgow, of which I am a partner, to remain as a loan to said firm should the partners thereof be willing to retain the same on loan, and that so long as my trustees in their opinion consider it reasonably safe to allow it to remain, and that also upon such terms and conditions as to interest, and with or without security beyond the personal obligation of the said firm and partners thereof, as my trustees shall think proper; or otherwise if, and when they think proper, to take payment of all sums of money which may be at my credit with said firm, or of any other firm of which I may be a partner at the time of my death, or of which I may have been a partner prior to my death, at such time or times as my trustees may from time to time determine, and that notwithstanding the provisions of any contract or contracts of copartnery into which I may have entered."

At the date of the death of Alexander Smith junior the remaining partners in the firm of A. & W. Smith & Company were William Smith, Hugh Osborne Smith, and Alexander Dawson Smith. The amount of Alexander Smith's interest in the firm was ascertained to be £19,857, 17s. 9d. The trustees resolved to allow this sum to remain in the business, but although a personal bond was drawn up for signature by the three partners it was never executed, nor was any formal obligation signed by any of the partners.

On 23rd December 1895 Alexander Dawson Smith retired from the firm of A. & W. Smith & Company. A minute of agreement between him and the remaining partners was entered into, which contained, *inter alia*, the following provisions:—"*First.* The said Alexander Dawson Smith retires from the said firm as at the date hereof, viz., 23rd December 1895, but he shall thereafter be as free to carry on business as engineer or otherwise as if he had never been a partner of the said firm, but he shall not be entitled to represent himself as the successor in business of the said firm of A. & W. Smith & Company. *Second.* The said William Smith and Hugh Osborne Smith shall, on the execution hereof, pay to the said Alexander Dawson Smith the sum of £9000 sterling, which sum the said Alexander Dawson Smith has agreed to accept in full payment of all sums standing at his credit in the books of the company, whether in the name of capital, interest, salary, or otherwise. *Third.* The parties hereto shall, when signing these presents also sign a notice of dissolution of the said firm in terms of the schedule hereto, which shall be advertised in the usual way in the *Edinburgh Gazette* and two at least of the Glasgow newspapers, and by circular to all

the parties from whom the said firm have received credit. *Fourth.* The said William Smith and Hugh Osborne Smith shall pay, and so free and relieve the said Alexander Dawson Smith, of all the obligations due by the said firm of A. & W. Smith & Company, and exhibit to the said Alexander Dawson Smith or anyone duly authorised by him, discharges thereof; and the said William Smith and Hugh Osborne Smith shall have right to the whole debts due to the said firm and other assets of said firm. The said Alexander Dawson Smith binds and obliges himself, if and when required by the first party, but at their expense, to execute all deeds that may be necessary for the purpose of carrying out this agreement."

Notice of the retirement of Alexander Dawson Smith was sent to the creditors of the firm, and among them to the trustees of Alexander Smith junior. On June 2nd, 1896, the firm of A. & W. Smith & Company, as newly constituted after the retirement of Alexander Dawson Smith, paid interest on the amount due to the trust, and the interest was received by the agent for the trust, but there was no meeting of trustees on the subject until 3rd November 1896.

On 3rd November 1896 William Smith and Hugh Osborne Smith, as trustees under Alexander Smith junior's trust, granted the following discharge in favour of Alexander Dawson Smith: —"We, William Smith, engineer, Glasgow, and Hugh Osborne Smith, engineer there, the surviving and accepting trustees of the late Alexander Smith junior, engineer, Glasgow, acting under his trust-disposition and settlement dated the 6th day of January 1892, and recorded in the Books of Council and Session the 21st day of December 1893, Considering that we, the said Wiiliam Smith and Hugh Osborne Smith, prior to the 23rd December 1895, carried on business as engineers in Glasgow in partnership with Alexander Dawson Smith, engineer there, under the firm of A. & W. Smith & Company; that the said firm and partners were at the said date indebted to us as trustees foresaid; that the said firm was dissolved at the said date by the retiral therefrom of the said Alexander Dawson Smith, and we, the said William Smith and Hugh Osborne Smith, as the continuing partners, undertook to free and relieve the said Alexander Dawson Smith of all the obligations due by the dissolved firm, and that we, as trustees foresaid, have accepted, as we hereby accept, the present firm of A. & W. Smith & Company, engineers, Glasgow, of which we, the said William Smith and Hugh Osborne Smith, are the sole partners, as our debtors, in lieu of the said dissolved firm and partners; therefore we, as trustees foresaid, have discharged and hereby discharge the said dissolved firm of A. & W. Smith & Company and the said Alexander Dawson Smith, as a partner thereof and as an individual, of all sums due and addebted by them or him to the said deceased Alexander Smith junior, or to us as trustees foresaid."

The circumstances under which this discharge was granted appears from the following extract from the minute-book of Alexander Smith's trust: —"*Present* — Messrs William Smith and Hugh Osborne Smith. Mr Parker, the law-agent, also present. Mr Parker stated that this meeting had been called to consider an application by Messrs A. & W. Smith & Company, engineers, Glasgow, and present partners thereof, and Mr Alexander Dawson Smith, formerly a partner of the firm, for a discharge of the latter's liability as such partner to this trust, for the money held by said firm from this trust on loan, amounting altogether to £19,857, 17s. 9d. It was stated that the firm of A. & W. Smith & Company had been dissolved as on the 23rd day of December 1895, by the retiral therefrom of the said Alexander Dawson Smith, and one of the conditions of the dissolution was that the remaining partners, viz., Messrs William and Hugh Osborne Smith, should pay and discharge the whole obligations of the said firm, including the indebtedness to this trust. Mr A. D. Smith now called for a discharge of this indebtedness, and the present firm of A. & W. Smith & Company, and partners thereof, requested that such a discharge should be given, and that they would undertake the whole liability for the sum stated. The law-agent pointed out to the trustees that, as they themselves were now the only partners of the said firm it would be difficult for them as trustees in this trust to consider this matter impartially, and that they ought to assume several other trustees, who would consider the application for the discharge of Mr Dawson Smith apart from the interest of A. & W. Smith & Company in the matter, and that after assuming new trustees they should resign the trusteeship. The law-agent further stated that the effect of their signing the discharge was to discharge a security held for this trust investment, and that they ought not to do so; and further, that if they were not also partners of Messrs A. & W. Smith & Company, they would not do so without an independent inquiry as to the security that would remain. The trustees after full consideration took the matter into their own hands, and resolved to grant the discharge, and the document being laid on the table they signed same."

On 19th December 1896 Messrs G. S. F. Edwards, Joseph Patrick, and Robert Howie were assumed as trustees under Alexander Smith's trust, and William Smith and Hugh Osborne Smith resigned.

On 3rd December 1896 the firm of A. & W. Smith & Company and William Smith and Hugh Osborne Smith, the individual partners thereof, executed a trust-deed for behoof of their creditors in favour of Thomson M'Lintock, C.A., Glasgow. Alexander Smith's trustees acceded to the trust, and received dividends amounting to 9s. 6d. in the pound, or £9682, 17s. 6d. on the debt of £19,857, 17s. 9d.

They subsequently brought the present action against Alexander Dawson Smith, concluding for payment of £10,702, 2s. 6d.,

the balance of the debt due by the firm to the trust after deducting the sum received in dividends, and for reduction of the discharge of 3rd November 1896.

The pursuers pleaded, *inter alia*—"(2) The said discharge being entirely gratuitous and *sine causa*, and having been granted by the said William Smith and Hugh Osborne Smith as trustees foresaid, and obtained by the said defender without any consideration having been received or given therefor, is invalid and ineffectual to discharge the defender of his liability for said loan. (3) The said discharge being entirely gratuitous and *sine causa, et separatim* having been obtained by fraud and collusion on the part of the defender, and the said William Smith and Hugh Osborne Smith, it ought to be reduced as concluded for."

The defenders pleaded—"(2) The pursuers' averments are irrelevant. (3) The pursuers' averments so far as material being unfounded in fact, the defender should be assoilzied. (4) The said discharge being valid and effectual, and not liable to challenge on any of the grounds libelled, the defender should be assoilzied. (5) The pursuers are barred by their actings since said discharge was granted from maintaining the conclusions of the summons. (6) It being impossible to effect *restitutio in integrum*, the conclusions for reduction should be refused."

A proof was taken, the import of which beyond what is stated above appears from the opinion of the Lord Ordinary *infra*. Neither William Smith nor Hugh Osborne Smith were examined.

On 5th January 1899 the Lord Ordinary (KINCAIRNEY) pronounced the following interlocutor:—"Finds that it is not proved that the discharge sought to be reduced was granted without consideration, or was obtained by fraud and collusion on the part of the defender, and of William Smith and Hugh Osborne Smith, the trustees at the date of said discharge of Alexander Smith junior: Therefore assoilzies the defender from the whole conclusions of the summons, and decerns: Finds the defender entitled to expenses," &c.

Opinion. — "This is an action by the trustees of the deceased Alexander Smith junior, engineer, Glasgow, concluding for reduction of a deed of discharge, dated 3rd November 1896, granted by the pursuers' predecessors in office, William Smith and Hugh Osborne Smith, who have resigned, whereby they, as trustees of Alexander Smith, discharged the dissolved firm of A. & W. Smith & Company, and the defender Alexander Dawson Smith as a partner and as an individual, of a debt due by them to Alexander Smith or to his trustees. The discharge is challenged on the grounds (1) that it was granted by Alexander Smith's trustees without any consideration, so giving up an obligation to the estate for nothing, and that it is therefore ineffectual; and (2) because being gratuitous it was obtained by fraud and collusion on the part of the defender and the granters William Smith and Hugh Osborne Smith. The sum concluded for is £10,702, 2s. 6d., which is a balance of a debt to the trust-estate, which amounted to £19,857, 17s. 9d.

"The consideration or narrative which the deed bears is, that before 23rd December 1895 the granters William Smith and Hugh Osborne Smith were partners in business with the defender Alexander Dawson Smith under the firm of A. & W. Smith & Company; that the firm and partners were indebted to Alexander Smith's trustees (being William Smith and Hugh Osborne Smith); that at that date the firm was dissolved by the retiral of the defender; and that William Smith and Hugh Osborne Smith as the continuing partners undertook to relieve the defender, the retiring partner, of all the obligations due by the dissolved firm. Up to this point the narrative is strictly accurate. The deed then proceeds, 'and that we, as trustees foresaid, have accepted, as we do hereby accept, the present firm of A. & W. Smith & Company, engineers, Glasgow, of which we, the said William Smith and Hugh Osborne Smith, are the sole partners, as debtors in lieu of the said dissolved firm and partners.'

"That is the reason stated for the discharge. It is founded on a previous transaction between William Smith and Hugh Osborne Smith and the defender, and on a transaction of the nature of novation, said, as I understand the deed, to have taken place before the date of the deed, and to have been adopted and ratified by the deed.

"It might have been desirable had the pleas of the defender been somewhat more distinct than they are; still I think they cover the whole grounds of defence, and they all seem to be involved in the narrative embodied in the discharge. The circumstances disclosed by the proof and correspondence are complicated, and require careful examination.

"The firm of A. & W. Smith & Company carried on an important and valuable business as engineers at the Eglinton Engine Works, Glasgow, their business consisting to a large extent in furnishing machines for use in sugar plantations and manufactories. In the year 1891 or 1892 the leading partner Alexander Smith senior died, and the firm thereafter consisted of his three sons, Alexander Smith junior, William Smith, and Hugh Osborne Smith, and the defender Alexander Dawson Smith, who was distantly related to the others. In disposing of this case it is not necessary to go further back in the history of the firm than 7th December 1893, when Alexander Smith junior died, after which the business was carried on by William Smith, Hugh Osborne Smith, and Alexander Dawson Smith until 23rd December 1895, when the defender retired.

"By the trust-deed of Alexander Smith junior he nominated William Smith and Hugh Osborne Smith as his trustees. With regard to his interest in the firm, he specially authorised his trustees to allow his share of the capital to remain as a loan to the firm, should the partners be willing to retain it as a loan, so long as his trustees

should think it safe to allow it to remain; and he further declared that his trustees should not be liable 'for allowing my share of the capital in the firm of A. & W. Smith & Company to remain as a loan so long as they think proper, nor for any loss that may arise therefrom, seeing it is my desire that my share should remain in the firm.'

"It was thus the act of the truster which gave rise to the embarrassing circumstance that the trustees, the creditors, and two of the debtors, and after the defender retired the sole debtors, were the same individuals. In compliance with the authority and direction in the trust-deed, the amount of the interest of Alexander Smith junior was allowed to remain in the firm. No bond or other acknowledgment was granted to the trustees, the reason for delay in the preparation of a bond being that there was difficulty in ascertaining the precise amount of the truster's interest in the company. That, however, was ultimately ascertained to be, or was fixed at £19,857, 17s. 9d., and that sum was entered in the books of the firm as a debt or loan on which interest was regularly paid, and this new firm then adopted the debt. No question is raised as to the amount. Both parties are agreed that it was a debt due by the firm to the trustees. But the defender declined to admit that it was a loan. I cannot say that I appreciate his distinction. It was an indebtedness resulting from an advance of money, and I think it was therefore a loan, and that the company and each individual partner were the debtors of the trustees for that amount.

"In January 1894 the defender visited Australia, and did not return until May 1895. I understand that during his absence he was engaged in attending to the business of the firm abroad.

"The books of the firm were balanced and audited annually at 31st March, and the defender was abroad when two of these balances were made, viz., on 31st March 1894 and 31st March 1895. It appears that during the defender's absence some pieces of business had been undertaken or done which ultimately turned out badly, and, in particular, there was one relating to the supply of machinery to a sugar plantation called the Bronte Estate in Trinidad, which it is necessary to mention particularly, because it seems to have been the main cause of the dissolution of the firm, and also of the ultimate downfall of the new firm. It does not appear when the dealing with this Bronte Estate began, but before the defender retired it had resulted in a debt to the estate of above £8000 insufficiently secured. Various plans appear to have been suggested in order to avert the loss thus threatened, and Messrs W. & H. O. Smith entertained the idea that the firm should take over the whole sugar plantation and work it. The defender was strongly opposed to this project, considering it foreign to the legitimate business of the company, and the differences between him and his partners (chiefly apparently about this Bronte Estate) became so pronounced that on 30th September 1895 William Smith and Hugh Osborne Smith gave notice to the defender that the partnership would be dissolved as on 31st March 1896. This they had power to do under the contract. But there was a question whether under the contract they were entitled to buy out the defender and keep the business, or whether, as the defender believed, he was entitled to keep the business and pay out his partners. He endeavoured to raise capital for this purpose, but found himself unable to carry it out, partly because the other partners were in a trust capacity proprietors of the business premises.

"The result was that the defender retired on terms expressed in a minute of agreement, dated 23rd December 1895, between the other partners and him. The terms of this minute are of great importance. It narrates that it had been arranged to dissolve the firm, and it provides—(1) That the dissolution should be at the date of the deed, and that the defender should be as free to carry on the business of an engineer as if he had not been a partner, but should not be entitled to represent himself as successor in business of A. & W. Smith & Company; (2) that the defender should be paid £9000; (3) that the parties should sign a notice of dissolution, which should be advertised and circulated among all the parties from whom the firm had received credit; (4) that William Smith and Hugh Osborne Smith should 'pay and so free and relieve the said Alexander Dawson Smith of all the obligations due by the said firm of A. & W. Smith & Company,' and exhibit discharges thereof, and that Alexander Smith and Hugh Osborne Smith should be entitled to the whole assets.

"The notice referred to in the agreement, which was advertised and sent to, *inter alia*, the trustees, was to the effect that the firm was dissolved of mutual consent, and that William Smith and Hugh Osborne Smith would continue the business for their own behoof, and would collect all debts and discharge all liabilities.

"In considering the effect of this agreement and of the notice on the relations between the trustees who were the creditors, the continuing partners, and the retiring partner, it is necessary, of course, to keep always in view the remarkable peculiarity that the creditors, the trustees, and the continuing partners were the same individuals. Nevertheless it is of course necessary to distinguish between these different characters. The agreement was between the partners only. The trustees were not parties to it, and could not be affected by it as a contract. It of itself did not affect the relation of creditor and debtor between the trustees and the defender Alexander Dawson Smith. He still remained debtor to the trustees in the full sum of £19,857, 17s. 9d. The agreement, however, besides discharging the defender in a question with his partners, brought to the knowledge of the trustees the facts (1) that the whole assets were transferred to the new firm, and (2) that the new firm were ready to pay the debts

and to take the position of debtors. These things were known to the trustees, because they in their character as partners were parties to the deed. Further, I think the discharge proves that the intention of the trustees was to relinquish the defender as their debtor, and to look for the payment of their debt to the new firm. I do not say that it bound them to do that. It did not bind the trustees at all. But when William Smith and Hugh Osborne Smith bound themselves to relieve the defender of this debt to the trustees by payment, that, I think, proves their intention, as trustees also, that he should be so relieved. Relief from this debt was part of the consideration which the defender was to receive for retiring from the firm. If it had been recognised that there was a debt of about £20,000 from which he could not be relieved because it was due to a trust, he would have, I suppose, insisted on and received more than £9000.

"Mr Robertson, C. A., the principal witness for the pursuers, thinks that the defender made an excellent bargain, and William Smith and Hugh Osborne Smith were excessively foolish, and the defender extremely sensible, rather too sensible, as Mr Robertson seems to insinuate. I suppose the defender did make a good bargain. Still the considerations were complex. It is true that £9000 was more than the amount at the defender's credit at the last balance-sheet of 31st March 1895. But then there was a question whether there had not been a mistake as to the number of the shares of the concern to which he had been held entitled; and that question was never solved. The £9000 was arrived at by a compromise. I daresay the defender was well quit of his partners, on the terms on which he quitted them, looking to their apparent extravagance and rashness, and also looking to the losses which befell the company afterwards, and which he may to some extent have foreseen. Still I see no ground on which I can consider this agreement as other than a fair and honest bargain as between the parties to it.

"It is necessary here to consider what was the financial condition of the company at this time—23rd December 1895. On the books its condition was fair enough, not so flourishing as it had been, but still not at all alarming. Mr Robertson, who examined the books for the pursuers, characterises the firm as then *vergens ad inopiam*. He finds bad debts entered as good debts, entries as profits of profits never realised, reckless drawings by the two partners William Smith and Hugh Osborne Smith, excessive liabilities, and insufficient working capital; and he says that that condition of matters could be discovered from the books by anyone who chose to look at them. It may be that if Mr Robertson had examined the books at 23rd December 1895, he would have found out all that, and been able to foretell the approaching bankruptcy of the firm. But Mr Gardiner, who examined the books, did not think so; and I do not understand that Mr M'Clintock endorses Mr Robertson's views, at least to their full extent; and the defender has adduced a considerable body of evidence to show that the firm was at that time in excellent repute, and that it was not then in fact in a hopeless condition. I am myself not convinced that it was, and am disposed to think that bankruptcy might have been avoided had the business been conducted as the defender desired, and had the other partners been less extravagant, and had they refrained from speculation about the Bronte estate.

"But the actual financial condition of the firm is not the precise point in question. The point is what the trustees and the defender thought of it. Now, with regard to the trustees, one embarrassing feature of this case is that neither of them is examined; their state of opinion and knowledge can only be guessed at; and further, Mr Fullarton, who acted for them *qua* partners as their law-agents, is dead. But I cannot but think that the action which they took in paying out the defender and keeping the concern to themselves, is totally inconsistent with the idea that they thought it *vergens ad inopiam*, or other than a valuable property. This may have proved their folly, but it negatives fraud at this date.

"I think that the defender saw further, and was more alive to certain bad points in the business, particularly in regard to the Bronte estate, and to the extravagance and rashness of his partners. But still (and notwithstanding his later letters) it is clear that he thought it substantially good—as indeed quite possibly it always was—and if the evidence as to his efforts to buy out his partners and get the business be believed (and there is no reason to doubt it), I think the conclusion must be admitted that in December 1895 he had no idea that it was in any danger. I think that the transaction which then took place was not tainted with fraud in any respect.

"In regard to this transaction I have further to remark that, so far as I can see, it could have been carried out in its terms. The continuing partners agreed to relieve the defender of the outstanding claims by paying them. I think it sufficiently proved that they could have done so. They seem to have been able to replace the money in the trust. The withdrawal of so much money from the business might have hampered them, unless they re-borrowed it. But I suppose there is no doubt that the trustees would, in point of fact, have immediately lent it anew to the firm. If they had done that, the defender would of course have been relieved without anything being done by the trustees which could have been challenged as to the detriment of the trust. The result would have been the same as the effect of novation, viz., the substitution of the new firm for the old as debtor to the trust.

"The defender was entitled to insist on the debt being actually paid; but he was under no obligation to insist on that being done. He might have waived his right. He might have dispensed with the expensive formality of actual payment to the

trustees, followed by a re-loan to the new firm—which I think would have been within the powers of the trustees—and accepted a discharge instead; or he might have been content with the extinction of the debt by delegation. If a discharge had at that time been granted, I fail to see that it would have injured the trust, or could have been characterised as in fraud of it. When trustees have invested trust money with a mercantile company, having the truster's authority to do so, I do not see that it is necessary, in every change of the company, that the money should be repaid to the trust if the trustees do not desire to disturb their investments.

"But at all events the transaction was not carried out in the precise form agreed to. The debt was not, in point of fact, repaid to the trustees, and no discharge by the trustees was granted. What was done was that the trust funds were allowed to remain on loan to the new firm from 23rd December 1895, when the defender retired, until 3rd December 1896, when the trust-deed for behoof of creditors was granted, interest being paid by the new firm on 2nd June 1896; and I cannot think it doubtful that the trustees, as matter of fact, adopted and regarded the new firm as their debtor, whether with the consequence of relieving the defender or no. Ultimately they ranked as creditors on the estate of the new company. But it appears to me that from the date of the defender's retiral it was understood that the trustees were the creditors of the new firm. Whether what then occurred amounted to delegation or novation so as to relieve the defender I will consider afterwards.

"The defender, not unnaturally, believing himself quit of the debt, did not think it necessary to get a formal discharge, and the matter was delayed. His agent Mr Cook, however, thought it necessary, and pressed for it. It was not, however, obtained till 3rd November 1896, when William Smith and Hugh Osborne Smith signed the discharge (the purport of which has been mentioned at the commencement of this opinion) against the strong and, as I think, natural remonstrance of their agent.

"A month after this it was found that the firm was in financial difficulties which it could not overcome, and the firm and partners granted a trust-deed for behoof of their creditors in favour of Mr M'Clintock, C.A., whose examination disclosed an apparent deficit of above £13,000, which may, I understand, be ultimately reduced. The trustees acceded to the trust and they claimed and have received a dividend. The sum sued for is, I understand, the amount of the original debt deducting the dividend.

"These being the facts, it was maintained for the pursuers that while the defender was a partner he was a debtor to the trustees for the sum advanced, and that in that obligation he was not in a position of a cautioner for the firm, but was a principal debtor; that his position was not altered by his retiral, and could not be altered so far as related to the trustees by minute of agreement, because the trustees were not parties to it. These positions appear to me to be fully borne out by the case of *Morton's Trustees* v. *Robertson's Judicial Factor*, November 22, 1892, 20 R. 72, on which the pursuers relied, and they maintained that the relation between the trustees and the defender remained the same at the date of the discharge.

"This reduction is founded upon fraud and collusion as one of its grounds. It is alleged that the discharge was procured by the defender and granted by the trustees in the knowledge of the approaching bankruptcy of the firm. I am satisfied that this averment, so far as it regards the defender, is not proved. He was no doubt dissatisfied with the manner in which the remaining partners were conducting their business, and I think it may be admitted that he at least strongly suspected that the Bronte debt was very bad; but he had recently returned from a long absence and had no intimate knowledge of the books, and I do not find it proved that he knew the condition of the business or suspected its danger.

"But the pursuers maintain that it is enough that they prove that the discharge was granted by the trustees fraudulently, and that, if they prove that, the defender—who it is said gave no consideration—cannot take benefit from their fraud. On this point reference was made to Lewin on Trusts, 1044; *Clydesdale* v. *Paul*, March 8, 1877, 4 R. 626; *Traill* v. *Smith's Trustees*, June 3, 1876, 3 R. 770; *Scolefield* v. *Templer*, 4 De Gex and Jones, 429. The principle is thus expressed by the Lord Chancellor in the case of *Scolefield*—'A person cannot avail himself of what has been done by the fraud of another unless he is not only innocent of the fraud, but has given some valuable consideration.' I do not doubt that the law is as the pursuers stated it, and I think that if the defender was the debtor of the trust at the date of the discharge, and if the trustees were under no antecedent obligation to grant it, if it was gratuitious, and if in granting it they acted fraudulently and in breach of their trust, then the discharge cannot be maintained.

"Now, it is exceedingly embarrassing to consider this question of fraud without the evidence of either of the persons charged with it. It is said that they must have known of the impending bankruptcy of the firm, and I agree that it is highly probable that they did. Still it is a possibility that it may have come upon them by surprise, and they might have given some explanation. There is some evidence, especially in the deposition of Mr Mackenzie, that they were not alive to the state of their affairs. Further, it may well be that the trustees honestly considered themselves under obligation to grant this discharge, and if so their conduct would not, I think, be fraudulent. I doubt whether in the absence of any explanations by the trustees what they did can be characterised as fraudulent. It is true that they may have had a motive for sacrificing the trust. They had no favour for the defender, and certainly did not sacrifice the trust in order to protect

him. Still they had an obvious motive, which was to protect themselves against an action of damages by him.

"Perhaps this question as to the active and conscious fraud of the granters would not be very important if it were made out that they discharged the defender without consideration or without any antecedent obligation. If that has been proved, I think the pursuers must succeed, on the principle that a trust estate may be followed into the hands of a person by whom it has been gratuitously received in the knowledge of the trust — Lewin on Trusts, p. 1044. Was then the discharge gratuitous? It bears to be for a consideration, although not given by the defender, viz., the substitution of the new firm for the old firm as a debtor. The pursuers maintained that this was no consideration at all, because the new firm was in any event the trustees' debtor. They maintained that it was so simply because it had the money of the trust. It appears to me that there was some misapprehension on this point. Strictly speaking, the firm had not the money of the trust. It had not been deposited with them. It was not earmarked. It had no doubt been converted into some form of stock or plant. They had the money of the trust only as they had any other money which had been lent to them, and the position of the trustees was, when the defender retired, just the same as that of any creditor of the firm. I do not see any distinction. Now, I am not prepared to admit that a new firm continuing the business of an old firm becomes thereby debtor to the creditors of the old firm. Neither does a conveyance of the whole assets necessarily produce that effect. I think there must be more, viz., an agreement between the new firm and the old creditors that they (the new firm) shall be the debtors for these old debts. It seems to me that the law has now been settled to that effect — See *M'Keand* v. *Laird*, March 17, 1860, 23 D. 846. *Miller* v. *Thorburn*, March 22, 1861, 23 D. 359; *Nelmes* v. *Montgomery*, June 15, 1883, 10 R. 974; *Heddle* v. *Marwick*, June 1, 1888, 15 R. 698; *Stephen's Trustees* v. *M'Dougall*, June 14, 1889, 16 R. 779; and *Henderson* v. *Stubbs*, November 13, 1894, 22 R. 51. Indeed it has been embodied in the Partnership Act.

"I do not think therefore that the mere fact that the new firm took over all the assets, including the trust funds, or whatever plant or other assets the trust funds may have been converted into, made them the debtors of the trustees. But still I think that, at and before the date of the discharge they had become the debtors of the trustees. That had by that time been practically admitted, and therefore the statement that the new firm was accepted as debtor in lieu of the old really added nothing to the validity of the discharge.

"Further, I consider that at the date of the discharge, 3rd November 1896, William Smith and Hugh Osborne Smith could not have fulfilled their obligation to the defender by making payment to the trustees. Their position was greatly worse than it was in December 1895, and I think that probably it would be a breach of trust to have lent the money on the personal obligation of the trustees at that date—the powers in the trust-deed notwithstanding.

"It then seems to come to this — If the trustees were under no antecedent obligation to grant this discharge, they were not in the circumstances entitled to grant it, and the defender could not avail himself of it. If so, the case would be a very hard one, because the decision would be against the clear understanding of all the parties who had transacted. But I think that in law it could not have been resisted.

"It seems to me, then, that the question comes to be whether at the date of the discharge the defender had right to insist on it on account of what had occurred before; or whether—which expresses the same thing in different terms—the trustees could at that time have successfully raised an action against the defender for payment of the debt. This really raises the defence of novation or delegation at some date before the date of the discharge. The pursuer's counsel objected that this was not pleaded on record. It is true that it is not expressly pleaded. This is not a case, however, which can be decided on mere defect of pleadings, and had I thought the pursuer's objection insuperable otherwise, I should have given the defender an opportunity of amending his record. But I think the question is raised by the discharge itself, which of course is embodied in the record. It speaks of the substitution of the one firm for the other. It speaks of that as a present act, and it may no doubt be contended that it speaks of it as a present act only. But I think that is not the necessary reading. It may refer to the past as well, and I consider that I am entitled to read it so in this mere question of avoiding a technical objection to the pleadings. Further, I am not sure that it requires to be specially pleaded, as it really arises out of the provision of the Partnership Act.

"I think, therefore, that I am entitled to consider this defence of novation. In support of this defence various authorities were referred to; in particular, *Bilborough* v. *Holmes*, 1876, 5 Ch. Div. 255; *Scarf* v. *Jardine*, 1882, 7 App. Cas. 345; and *Rolfe and Bank of Australasia* v. *Flower Sutting & Co.*, L.R., 1 P.C. 27; and I would particularly refer to the exposition of the law of novation in cases of partnership by Lord Selborne in *Scarf, supra*. But I do not think it necessary to make further reference to these cases, because I find the law on the point expressed in sub-section 3 of section 17 of the Partnership Act 1890 (53 and 54 Vict. cap. 39), which is as follows:—'A retiring partner may be discharged from any existing liabilities by an agreement to that effect between himself and the members of the firm as newly constituted and the creditors, and this agreement may be either express or inferred as a fact from the course of dealing between the creditors and the firm as newly constituted.

"There was in this case no express agreement to the effect here specified; but it may be inferred from the course of dealing, and it is worthy of notice that the inference is to be drawn, not from anything which takes place between the creditors and the retiring partner, but from the course of dealing between the creditors and the new firm. The only question here is whether an agreement by the trustees to discharge the defender can be inferred from their dealings with the new firm. No doubt there was not much time for a course of dealing between December 1895 and November 1896, and transactions were necessarily few when the creditors and debtors were identical. Still I think it clear that the trustees intended to relieve the defender, and that their dealings must be held to have been in fulfilment of that intention. There are one or two points which may be here noticed. In the first place, there was the preparation of a bond in favour of the trustees. The draft was framed before the defender retired, and the name of the defender was inserted with those of the other two partners as obligants. But after his retiral this draft was revised by the agent of the remaining partners, and the defender's name was struck out. There is a minute of trustees, dated 10th February 1896, which bears that the agent of the trust reported that the bond to be granted by Messrs A. & W. Smith & Company to the trustees had been sent for revisal, and I think that at that date A. & W. Smith & Company could only signify the new firm. The defender was represented by a different agent, and this draft bond was never submitted to him. Again on 2nd June the new firm paid the interest of the debt to the trustees. That might not of itself be conclusive, but it becomes so when it is considered that the creditors and debtors were the same, and that the trustees understood that the defender was to be discharged. Further, the money itself remained with the new firm. I am of opinion, on the whole, that the defence of novation is instructed; and that for a considerable time before the date of the discharge the change of the one debtor for the other had been effected.

"It remains for consideration whether this change of the one debtor for the other by novation was not to be regarded as a breach of trust from which the defender cannot benefit. Discharge by novation could not, it may be said, be better than express discharge, and the validity of an express discharge might be objected to as injurious to the trust. Now, I am of opinion that had a discharge been granted at that date on the footing that the trustees should obtain the new firm as a debtor, it would have been effectual, for it would not have been without consideration to the trust. As to the adequacy of the trust security, it was for the trustees to judge, and I think that such a discharge could not have been accounted a breach of trust or a fraud against the trust, if it really and in substance amounted to a shorthand method of re-investing the funds after they had been in form repaid to the trustees.

"It seems to me that his case falls to be decided in respect of what took place when the defender retired, and in respect of the subsequent dealings of the trustees with the new firm. If there was then novation, then the discharge was the mere formal implement of the preceding contract, and if it was so, it was granted with full consideration.

"While the case has appeared to me very difficult and complicated, the conclusion which I have reached seems to me certainly in accordance with equity.

"I do not require to consider the defences founded on the pursuers having acceded to the trust-deed granted by the new firm and its partners, and having claimed and obtained a dividend. I may only say that I do not see that this case can on that point be distinguished from the case of *Morton's Trustees*, or that this defence could be supported consistently with that decision.

"The defender complained that he had not been consulted enough in regard to the carrying out of the trust for creditors; but whether his complaint be well founded or no, I do not see how it could be directed against the pursuers, or could in itself form any ground of defence."

The pursuers reclaimed, and argued—The Lord Ordinary was with them on the point that if the discharge was a breach of trust on the part of the trustees, was gratuitous, and not granted in pursuance of any antecedent obligation, the defender could not take advantage of the trustees' fraud. The authorities cited by him were conclusive to that effect. It was clear that the discharge of a debtor without consideration and without an antecedent obligation, was a breach of trust on the part of the trustee. Whatever obligation the individual trustees, as partners of A. & W. Smith & Company, might have undertaken in favour of the defender, as trustees they were under no obligation to discharge him of the debt. It was clear that as a partner of the firm he had become liable for it, because his partners had accepted it as a loan to the firm in the firm's business, and in doing so bound him — Lindlay on Partnership, p. 143; *Bryan* v. *Butters Brothers*, Feb. 23, 1892, 19 R. 490. The Lord Ordinary was wrong in holding that the debt of the old firm had been discharged by novation or delegation prior to the date of the discharge. The authorities on that point had been incorporated in sec. 17, sub-sec. 3 of the Partnership Act 1890, in the following terms:—"A retiring partner may be discharged from any existing liabilities by an agreement to that effect between himself and the members of the firm as newly constituted and the creditors, and this agreement may be either expressed or inferred as a fact from the course of dealing between the creditors and the firm as newly constituted." Nothing that took place before the granting of the discharge could discharge the defender under the terms of that section. The mere taking of interest from the new firm was not sufficient—*Morton's Trustees* v. *Robertson's Judicial Factor*, Nov. 22,

1892, 20 R. 72. Again, the discharge was gratuitous. The only consideration for it that could be suggested was that the trust got the obligation of the new firm in place of that of the old. But in a question with the creditor the old and new firm were really on the same footing—*Heddle* v. *M'Laren*, June 1, 1888, 15 R. 698; *Stephen's Trustees* v. *Macdougall & Co.'s Trustee*, June 14, 1889, 16 R. 779. Suppose the new firm had refused to take over the debts of the old, still if they obtained the use of the trust money, they were clearly liable for it unless it was otherwise arranged with the trustees. If then the discharge could not be supported, the only remaining question was, whether the trustees by ranking as creditors of the new firm had elected to treat that firm as their creditors, and thereby liberated the defender as a member of the old firm. On that question the case of *Morton's Trustees* (*cit. supra*) was directly in point and conclusive in the negative. The case of *Scarf* v. *Jardine*, June 13, 1882, 2 App. Cas. 345, was distinguishable. There creditors sued a retiring partner for a debt incurred by the firm after he retired. His liability could only be established on the principle of estoppel, that he was barred from denying his liability because he had failed to give notice of his retirement, and it was held that the creditors there, by ranking on the estate of the new firm, had recognised his retirement, and were therefore precluded from a "plea of estoppel proceeding on the basis that he had not retired." Here the defender was directly liable for the debt, and ranking on the estate of the new firm, which was also liable, could not discharge him of his liability for the balance remaining after the estate of his co-obligant was exhausted. The law as to discharging a cautioner by giving time to the principal did not apply here, because the defender was not liable as a cautioner for the bankrupt firm, but as an independent debtor. If he complained of the pursuers' management of the bankrupt estate he is himself responsible for it, because he might have paid the debt and ranked as a creditor himself.

Argued for the defender—The discharge was good, because (1) it was a fulfilment of an antecedent obligation, and (2) the trust got consideration for it in the obligation of the new firm as constituted after the defender retired. Supposing William Smith and H. O. Smith, as the partners of A. W. Smith & Company, had paid the debt to themselves as trustees, and then lent it again to the firm, there could be no doubt that the defender's liability would have been discharged. That would have been a perfectly competent proceeding under the wide powers of the trust—*Lowson's Trustees* v. *Alexander*, March 8, 1890, 17 R. 571, and though they did not directly follow that course, the discharge to the defender amounted to the same thing, and should have the same effect. Besides, the debt for which the discharge was granted had, as the Lord Ordinary held, already ceased to exist. Novation or delegation had taken place, and the debt of the new firm had been substituted for that of the old. The acceptance of interest from the new firm was sufficient to infer that—*Evans* v. *Drummond*, 1831, 4 Exp. 89; *Thompson* v. *Percival*, 1834, 5 B. & Ad. 925; *Bilborough* v. *Holmes*, 1876, 5 Ch. Div. 255; *Buchanan & Co.* v. *Somerville*, Feb. 19, 1799, M. 3402; *Ker* v. *M'Kechnie*, Feb. 22, 1845, 7 D. 494. The acceptance of the obligation of the new firm was a good consideration for the discharge of the old. A new firm taking over the assets of the old were not thereby liable for its debts unless they undertook liability—*Heddle* v. *M'Laren*, June 1, 1888, 15 R. 698, *per* Lord Adam at p. 706; *Henderson* v. *Stubbs, Limited*, Nov. 13, 1894, 22 R. 51. But even assuming that the validity of the discharge cannot be maintained, the subsequent actings of the trustees (who were now, it was to be noted, an independent body) had liberated the defender. They had their choice whether to sue the old firm, of which defender was a partner, or to rank on the estate of the new firm. They could not sue both, and having made their election to sue the new firm, they could not now go back upon it—*Scarf* v. *Jardine*, June 13, 1882, 7 App. Cas. 345, *per* Lord Watson at p. 363, and Lord Blackburn at p. 358. The case of *Morton's Trustees* v. *Robertson's Judicial Factor*, Nov. 22, 1892, 20 R. 72, when the facts there were considered, was not inconsistent with this argument. There the partner who was sued had expressly undertaken full liability for the debt as a principal debtor. Here he was only a cautioner for his firm. The present case was especially strong for the application of the principle of election, because the defender was prejudiced by the ranking on the estate of the new firm. If he, as partner of the old firm, had been sued, he could have ranked on the estate of the new firm, and had an opportunity as their principal creditor of controlling the liquidation. He was entitled to the equities as between principal and cautioner, because as an individual partner he was only liable subsidiarily after the estate of the firm had been exhausted—Bell's Comm. ii. 507; *Muir* v. *Collett*, June 17, 1862, 24 D. 1119; *Bernards* v. *North British Railway Co.*, May 31, 1899, 36 S.L.R. 683; *Rome* v. *Bradford Banking Co.*, 1894, A.C. 586, *per* Lord Herschell, p. 596.

At advising—

LORD ADAM—The firm of A. W. Smith & Company was dissolved by the death of one of the partners, Alexander Smith junior, on 7th December 1893. The remaining partners, his brothers William Smith and Hugh Osborne Smith, and the defender continued to carry on the business until 23rd December 1895, when the defender retired from the firm. William Smith and Hugh Osborne Smith continued to carry on the business until 3rd December 1896, when they executed a trust-deed for behoof of their creditors.

Alexander Smith junior left a trust-settlement dated 8th January and 20th September 1893, by which he appointed William Smith, Hugh Osborne Smith, and his widow to be his trustees.

He thereby authorised his trustees to allow his share of the capital in the firm at his death to remain as a loan to the firm so long as his trustees in their opinion should consider it reasonably safe to allow it to remain. His share of the capital was allowed by the trustees to remain as a loan to the firm—that is, the new firm consisting of William Smith, Hugh Osborne Smith, and the defender. The value of the truster's interest in the firm was subsequently ascertained to be £19,857, 17s. 9d.

The pursuers of this action are the present trustees of Alexander Smith junior, and they claim payment of the sum of £10,702, 2s. 6d. from the defender as the balance remaining unpaid of the £19,857, 17s. 9d., and with a view to this end they seek reduction of a discharge dated 3rd November 1896, granted by William Smith and Hugh Osborne Smith, who were then the sole surviving and acting trustees of Alexander Smith junior, in favour of the defender, whereby they discharged him of his liability as a partner of their firm of A. W. Smith & Company for the said sum of £19,857, 17s. 9d. held on loan from the trust.

The Lord Ordinary has repelled the reasons of reduction and assoilzied the defender.

It appears that at the first meeting of the trustees, held on 10th January 1894, with reference to the power given to the trustees by the truster to allow his share in the firm of A. W. Smith & Company to remain as a loan to that firm, Mr William Smith stated that his firm was willing to take on loan the residue of the estate, and that the trustees having considered the matter agreed to the loan, and instructed their agent, when the amount was ascertained, to have the loan put upon a proper footing by taking a personal bond for the amount from the firm and several partners thereof.

It further appears that at the next meeting of the trustees, held on 30th August 1895, the law-agent laid before the meeting a statement made up by A. W. Smith & Company as at 11th November 1894 showing the sum of £19,857, 17s. 9d. as the balance of the deceased's interest in the firm, and that the trustees instructed their agent to prepare a personal bond for the signature of the partners of the firm for £19,500, and to obtain their cheque for the balance. The draft of such a bond was prepared and sent to the agents of the firm for revisal, but it was never executed.

The defender was abroad when these transactions took place, and he alleges that he was ignorant of these resolutions of the trustees, which, he says, were never communicated to him. But even if so, that does not appear to me to be material, for if the matter is to be considered as a loan to the firm, the other partners were entitled to bind him, in respect that it was a loan to be applied to the use of the firm, or if, as it appears to me, it is to be considered as a debt for which the firm was liable, as being the value of the interest of the deceased partner in the dissolved firm, in either case the three partners were conjunctly and severally liable for the amount.

In consequence of disputes between William Smith and Hugh Osborne Smith on the one hand and the defender on the other (which it does not appear to be necessary to consider in detail) as to the manner in which the business of the firm was being conducted, the defender retired from the firm on 23rd December 1895, in terms of a minute of agreement between the partners of that date.

By the second article of this agreement it was stipulated that William Smith and Hugh Osborne Smith should pay to the defender the sum of £9000 sterling, which sum he had agreed to accept in full payment of all sums standing at his credit in the books of the company, whether in name of capital, interest, salary, or otherwise.

By the fourth article it was stipulated that William Smith and Hugh Osborne Smith should pay, and so free and relieve the defender of all obligations due by the firm, and exhibit to him discharges thereof, and that the said William Smith and Hugh Osborne Smith should have right to the whole debts due to the firm.

The defender of the same date received payment of this sum of £9000, but William and Hugh Osborne Smith did not pay all the obligations of the firm—at least they did not pay the debt due to the trustees of Alexander Smith junior and so relieve him thereof.

Notice was sent to the trustees of the dissolution of the firm, and that William Smith and Hugh Osborne Smith were to carry on the business for their own behoof under the same firm name, and that they would collect all debts due to and discharge all the liabilities of the late firm.

It appears to me that there is nothing objectionable in this agreement as an agreement between the partners. The defender may or may not have made a good bargain, but that does not affect the present question. The trustees were no parties to the agreement, and I think that it is hopeless to contend that it had the effect of discharging the defender of his liability for the debt due to them—and the Lord Ordinary is of the same opinion.

The Lord Ordinary, however, is of opinion that circumstances occurred subsequent to the retirement of the defender from the firm, and before the date of the discharge sought to be reduced, which altered the complexion of the case and operated the discharge of the defender, and this, in his view, is the cardinal part of the case.

Sub-section 3, section 17, of the Partnership Act 1890 enacts that a retiring partner may be discharged from any existing liabilities by an agreement to that effect between himself and the members of the firm as newly constituted and the creditors, and that this agreement may be either express or inferred as a fact from the course of dealing between the creditors and the firm as newly constituted.

The Lord Ordinary thinks that there was such a course of dealing between the trustees and the newly constituted firm from which it can be inferred as a fact that the trustees agreed to discharge the defender.

The first circumstance on which he founds

is that a draft bond was prepared in favour of the trustees for the amount of the debt due to them, and that in this draft the defender appeared as a conjunct and several debtor with William Smith and Hugh Osborne Smith, but that after the defender's retiral from the firm the draft was revised by the agent for William Smith and Hugh Osborne Smith, when the defender's name was struck out of it, leaving William Smith and Hugh Osborne Smith as the only debtors on the face of the bond. If the name of the defender had been struck out of the draft bond by the agent of the creditors, or if the bond as so altered had been accepted by them, I could have seen the force of the observation, but as neither of these things happened I fail to see the relevancy of the circumstance.

The only other circumstance founded on is that on 2nd June 1896 the trustees accepted from the new firm a sum of £452, 12s. 11d., being a half-year's interest on the debt. This sum was paid to the agent of the trust, and a receipt for it granted by him. He certainly never imagined that by so doing he was discharging the defender of his liability for the capital of the debt.

I do not think that it can possibly be inferred from the trustees' acceptance of this sum from the new firm, who had intimated to them that they had undertaken to pay the debts of the old firm, that they thereby agreed to discharge the defender of his existing liabilities, or, as the Lord Ordinary puts it, agreed to accept the new firm as their sole debtor in lieu of the old firm and its partners. The mere acceptance of the money would not have that effect in law, and if that be so, there is nothing in the case that I see to give it that effect.

The Lord Ordinary says that the taking of the money might not of itself be conclusive, but that it becomes so when it is considered that the creditors and the debtors were the same, and that the trustees understood that the defender was to be discharged. I think it is a fallacy to say that the creditors and debtors were the same. The trustees were, no doubt, nominally the creditors, but the true creditor was the beneficiary under the trust, nor were the debtors the same, because the defender was a debtor and he was not a trustee, nor do I know of any evidence that the trustees understood that the defender was to be discharged by this payment, or otherwise than by payment by William Smith and Hugh Osborne Smith of the obligations of the old firm, as they had undertaken to him to do.

The truth is, that William Smith and Hugh Osborne Smith, in their capacity as trustees, had never had the matter of the defender's discharge under their consideration at all. The minutes of meeting of the trustees have been produced, and there is only one minute during the period in question, and it has no reference to the matter.

I cannot concur in the conclusion at which the Lord Ordinary has arrived, that prior to the date of the discharge which we have now to consider, there had been novation of the debt.

This discharge is dated 3rd November 1896, and is granted by William Smith and Hugh Osborne Smith in favour of the defender.

It proceeds on the narrative that they prior to 23rd December 1895 had carried on business with the defender under the firm of A. W. Smith & Co., that the firm and partners were indebted to them at the said date as trustees of Alexander Smith junior, that the firm was dissolved at the said date by the retiral therefrom of the defender, and that they as the continuing partners undertook to pay, free, and relieve the defender of all the obligations due by the dissolved firm, and that they, as trustees foresaid, had accepted, as they thereby accepted, the present firm of A. W. Smith & Co., of which they were the sole partners, as their debtors in lieu of the dissolved firm and partners, and therefore they thereby discharged the said dissolved firm and the defender as a partner thereof and as an individual, of all sums due and addebted by them or him to the deceased Alexander Smith junior, or to them as trustees foresaid.

It is desirable to see under what circumstances this discharge was considered and signed. It appears, accordingly, from the minutes of meeting at which this was done, that Mr Parker, the agent of the trustees, very properly stated to them that as they themselves were the only partners of the firm it would be difficult for them as trustees in the trust to consider the matter impartially, and that they ought to assume several other trustees, who would consider the application for the discharge of the defender apart from the interest of A. W. Smith & Co. in the matter, and that after assuming new trustees they should resign the trusteeship.

The agent further pointed out to them that the effect of their signing the discharge was to discharge a security held for the trust investments, and that they ought not to do so, and further, that if they were not also partners of A. W. Smith & Co. they would not do so without an independent inquiry as to the security that would remain.

It further appears from the minute of meeting, that the trustees, after full consideration, took the matter into their own hands and resolved to grant the discharge, and the instrument being laid on the table they signed the same.

It was in these circumstances that the discharge was signed.

William Smith and Hugh Osborne Smith were at the time being pressed by the defender to pay the debt and so operate his discharge, as they were bound to do. The Lord Ordinary thinks—and I agree with him—that they knew they could not pay the debt. It was pointed out to them what the effect would be as regards the trust estate of their granting the discharge, and having regard to their conflicting interests as creditors and debtors they were not in a position to consider the matter impartially; nevertheless they took the matter into their own hands and signed the discharge. By so doing it appears to me that as trus-

tees they knowingly and deliberately sacrificed the interests of the estate under their charge in their own personal interest as debtors to the trust. By so doing it appears to me that they not only committed a breach of trust but a fraudulent breach of trust.

The next question for consideration is the position of the defender in the matter of this discharge, and I do not see that he was in any way to blame in taking it. It is true that the discharge was not in such terms as his ex-partners were bound to have procured and exhibited to him. They were bound to pay the debt, and so free and relieve him of it. It appears, however, on the face of the discharge, that they had not paid the debt, and that he was discharged only because the trustees alleged that they had agreed to accept the new firm and its partners as their debtors in lieu of the old firm and its partners. If the defender chose to be content with such a discharge, *valeat quantum*, I think he was entitled to take it.

I agree with the Lord Ordinary that no fraud attaches to the defender as regards this discharge. He was not bound to know anything, and apparently knew nothing, of the proceedings of William Smith and Hugh Osborne Smith, either as trustees or as partners of the firm after he had quitted it in December 1895.

I further agree with the Lord Ordinary that the fact that the defender was not participant in the fraud of William and Hugh Osborne Smith is not necessarily sufficient to support the discharge as far as he is concerned.

I agree with the Lord Ordinary in his statement of the law on the matter as applicable to this case to the effect that if the defender was the debtor of the trust at the date of the discharge, and if the trustees were under no antecedent obligation to grant it, if it was gratuitous, and if in granting it they acted fraudulently and in breach of their trust, then the discharge cannot be maintained.

I think that all these conditions are complied with in this case.

I have already stated the grounds on which I think, differing from the Lord Ordinary, that the trustees were under no antecedent obligation to grant the deed, in respect that there was no novation of the debt, and that therefore the defender remained a debtor to the trust.

It appears to me that the discharge was entirely gratuitous. Its effect was simply to discharge the defender. So far as I can see, the trust estate received no benefit or consideration, valuable or otherwise, in consequence of its having been granted, and I have already said that I think the trustees acted fraudulently in granting it. If that be so, however hard it may be on the defender I do not think the discharge can be supported in law.

The only other matter to which I think it necessary to refer is, that in December 1896 the new firm granted a trust-deed for behoof of their creditors, that the pursuers acceded to the trust, and claimed and received several dividends from the estate.

It was strongly contended to us, on the authority of the case of *Scarf* v. *Jardine* referred to by the Lord Ordinary, that the pursuers had thereby elected to accept the new firm as their debtor, with the necessary result of discharging the previous firm and its partners of their liabilities.

I think it only necessary to say that that case appears to me to differ in essential particulars from the present, which I agree with the Lord Ordinary in thinking cannot be distinguished from the case of *Morton's Trustees*, 20 R. 72, and which we are bound to follow.

On the whole matter I think the interlocutor of the Lord Ordinary should be recalled and decree pronounced in favour of the pursuers.

LORD M'LAREN—I concur entirely in Lord Adam's opinion, and shall only state the results as they present themselves to my mind in two propositions. On the first and main question it is certain that the trustees as such received no consideration whatever for the discharge which they granted, and as the discharge was gratuitous it follows that the defender, as a person taking benefit under a gratuitous deed, can have no right other than what the granter was entitled to give. The granting of this discharge was a manifest breach of trust on the part of the trustees, and so the right of the defender, who gave nothing for the discharge, is subject to the infirmity of the trustees' title.

On the second point I observe that in the case of *Scarf* v. *Jardine* the defender was not liable by contract for the debt on which he was sued. He was a retired partner, and he was sought to be made liable, not for a debt incurred by him as a member of the firm, but for a debt incurred after he had retired, on the ground that he remained liable as a partner because he had not given notice of his retirement. In these circumstances the House of Lords was of opinion that the act of claiming from the representatives of the new firm was inconsistent with the only hypothesis on which the case against the defender could be sustained, viz., that the creditor held the old firm liable. In the present case Mr Smith was an original debtor in the obligation, because the trust money was lent to the three partners collectively, and the fact that his partners and successors in the business have been made liable through their trustee is not in any way inconsistent with the theory of this action, which is, that the three partners of the old firm were and are, conjunctly and severally, responsible for the loan. While at first sight the case of *Scarf* v. *Jardine* may appear to be analogous to the present case, when it is further examined it is seen that there is a clear distinction in principle—I mean that the principle of election there given effect to has no application to a case where all the partners were originally liable as co-obligants in the obligation resulting from the loan.

LORD KINNEAR concurred.

The LORD PRESIDENT was absent.

The Court pronounced this interlocutor:—

"Recal the said interlocutor [5th January 1899]: Find that the discharge granted by William Smith and Hugh Osborne Smith in favour of the defender dated 3rd November 1896 was entirely gratuitous and *sine causa*, and was granted by the said William Smith and Hugh Osborne Smith, and obtained by the said defender without any consideration having been received or given therefor, and is invalid and ineffectual to discharge the defender of his liability for the loan: Find that the said discharge was granted by the said William Smith and Hugh Osborne Smith fraudulently: Therefore sustain the second and third pleas-in-law stated for the pursuers: Reduce, decern, and declare in terms of the reductive terms of the summons: Further, decern and ordain the defender to make payment to the pursuers, as trustees foresaid, of the sum of £9682, 17s. 6d. sterling, with interest at 5 per cent., on the sum of £10,702, 2s. 6d., from 15th April 1898 to 7th July 1898, with interest at 5 per cent., on the sum of £10,192, 10s. from 7th July 1898 to 22nd September 1899, and with interest at 5 per cent., on the said sum of £9682, 17s. 6d. from 22nd September 1899 to the date of payment: Find the pursuer entitled to expenses," &c.

Counsel for the Reclaimers—Ure, Q.C.—Findlay. Agents—Simpson & Marwick, W.S.

Counsel for the Respondents—Salvesen, Q.C.—Younger. Agents—J. W. & J. Mackenzie, W.S.

Wednesday, March 14.

SECOND DIVISION.

[Lord Kincairney, Ordinary.

WALLACE *v.* BRAID.

Liferenter and Fiar — Repairs Executed by Liferentrix on Property Liferented—Recompense.

A contractor who had executed repairs on certain house property, sued the fiars for the cost of the repairs, amounting to £392. The pursuer averred that he had done the work on the instructions of the liferentrix in order to prevent the property becoming ruinous; that after being repaired the property yielded a gross rental of £60 a-year; that the defenders having refused to pay any part of the cost, the liferentrix had assigned to the pursuer all her claims against them, and that the sum sued for represented the value of the work to the defenders.

The Court *dismissed* the action as irrelevant, holding that a liferenter was always presumed to make such improvements for his own benefit, and that this presumption was not excluded by the pursuer's averments.

Liferenter and Fiar—Payment by Liferenter of Debt Secured on Property Liferented—Recompense.

In an action for payment of a sum of money raised against the fiars of a heritable property, the pursuer averred that the former proprietor of the subjects had left them in his trust-disposition to different persons in liferent and fee; that there had been a debt left by the deceased heritably secured on the property; that the lifereutrix at her own hand had paid off this debt without taking any assignation to the bond; that in doing so she had enhanced the value of the fee; and that therefore the defenders were liable in repayment to the pursuer as assignee of the liferentrix of the sum so paid by her.

The Court *dismissed* the action as irrelevant.

Process—Res judicata—Judgment on Relevancy.

A tradesman who had executed certain repairs on buildings, sued the fiars and a liferentrix who had ordered the repairs, jointly and severally, for payment of his account. The action was dismissed against all the defenders as irrelevant. In a subsequent action the same pursuer after the death of the liferentrix sued the fiars for the same account, founding on an assignation by the liferentrix of her claim, if any, against the fiars for the cost of the repairs, no such assignation being founded on in the previous action.

Opinion by the Lord Justice-Clerk and Lord Trayner that the second action was not excluded by the plea of *res judicata*. *Opinion* by Lord Young and Lord Kincairney *contra*.

On 24th March 1899, Richard Wallace, contractor, Edinburgh, as an individual and also as an assignee of Miss Christian Braid, liferentrix of certain heritable property in the parish of Livingstone, Linlithgowshire, conform to assignations in his favour dated 10th February 1896 and 22nd February 1899, raised an action against Robert Braid and Andrew Braid asking the Court to ordain the defenders to pay him (1) £134, 17s., and (2) £392, 10s. 9d., and further or otherwise to declare that he was entitled to have the fee of the above subjects burdened with these sums, and in any event to adjudge and declare that these subjects belonged to him in security and satisfaction of the said two sums, or otherwise to declare that the fee of these subjects was burdened with repayment to him and his heirs and executors of said two sums.

The pursuer averred as follows:—(1) *With regard to the sum first sued for*—Andrew Braid died on 9th February 1870 leaving a trust-disposition and settlement dated 21st August 1866, and recorded 1870, by which he conveyed his whole estate to his three daughters Jean, Christian, and Frances,