

that the First Division of the Court in *Milne*, 20 R. 95, 30 S.L.R. 105, where husband and wife were called as here, assoilzied the husband and allowed the action to proceed against the wife, and that the Second Division in *Caughie*, 25 R. 1, 35 S.L.R. 3, granted an issue in terms which might have resulted in the same result, while in *Robinson*, 2 F. 928, 37 S.L.R. 718, Lord Moncreiff stated an opinion *obiter* in opposition to those of Lord M'Laren and Lord Trayner referred to above. In these circumstances I am bound to follow the judgment in *Milne's* case, and I have accordingly dismissed the action against Buchan and allowed it to proceed against Smith."

The pursuer appealed for jury trial.

The defender objected to the competency of the action, and argued—In the petition what was asked was simply a joint-decree against Smith and Buchan, who were the "defenders." The terms of the conclusion overruled the character in which Buchan was called. If, for example, decree were to pass on this summons in the undefended roll, the decree would clearly be one importing joint-liability—*Mackersy v. Davis & Sons*, February 16, 1895, 22 R. 368, 32 S.L.R. 277; *Milne v. Smiths*, November 23, 1892, 20 R. 95, 30 S.L.R. 105.

Argued for the pursuer and appellant—It was clear from the condescendence and pleas-in-law that the pursuer sought decree only against Smith. In the petition Buchan was called only "for any interest he may have" and the word "defenders" in the prayer must be read in connection with these words. The action being really an action against Smith should be allowed to proceed against him and should not be thrown out on the very technical ground stated by the defender.

LORD PRESIDENT—This action is certainly not very artistically framed. The position in which it now stands is that the Sheriff has found that there is no relevant case against the defender Mr Buchan, and has dismissed the action in so far as directed against him. I think that in doing so he was right. There is no allegation in the condescendence against Mr Buchan, and the petition bears that he was called merely "for any interest he may have." This leaves the defender Smith still in the action, and the Sheriff has allowed a proof so far as he is concerned. This is, I think, the proper course to take in the circumstances.

LORD ADAM—It is quite clear from the record in this case that the pursuer sought decree against nobody but Smith. There are no averments against the other defender Buchan, but for some obscure reason known only to himself he calls Buchan for his interest. The difficulty is to see what the pursuer means by asking decree against "the defenders." Now, looking to the averments and the pleas-in-law, it is clear, as I have said, that the action is really only against Smith. Accordingly it seems to me that the Sheriff was right in allowing the action to go back to the Sheriff-Substitute to take a proof before answer.

LORD KINNEAR concurred.

LORD M'LAREN was absent.

The Court remitted the case to the Sheriff-Substitute for proof.

Counsel for the Pursuer and Appellant—G. Watt, K.C.—D. Anderson. Agent—John N. Rae, S.S.C.

Counsel for the Defender and Respondent—Deas—Morton. Agents—Macpherson & Mackay, S.S.C.

Saturday, May 28.

## SECOND DIVISION.

(With Three Consulted Judges.)

[Lord Kyllachy, Ordinary.]

### ASSETS COMPANY, LIMITED v. BAIN'S TRUSTEES.

*Trust—Process—Action against Trustees after Estate Distributed and Trustees Discharged—Competency.*

Held, in a Court of Seven Judges (rev. judgment of Lord Kyllachy), per the Lord President, Lord Justice-Clerk, Lords Adam and Trayner, following *Assets Company, Limited v. Falla's Trustee*, December 11, 1894, 22 R. 178, 32 S.L.R. 143—that an action is competent against trustees, for the purpose of constituting a claim against the trust estate, after the trust estate has been distributed and the trustees have been discharged by the beneficiaries—*diss.* Lords Young, Kinnear, and Moncreiff.

*Company—Contract—Discharge—Reduction of Discharge on Ground of False Statements—Representation or Warranty—Fraud—Mora.*

In 1879 the liquidators of the City of Glasgow Bank entered into a compromise with B, a contributory of the bank who was unable to meet calls, "on the basis and on condition of the truth, accuracy, and completeness" of a written "statement of his affairs, means, and property," appended to his answers to certain questions put by the liquidators to contributories with whom they effected compromises. One of these questions was—"What property do you possess, and what is its nature and value to the best of your knowledge and belief?" B, as required, made a solemn declaration that the answers he had given to the questions put to him were true and correct answers "to the best of my knowledge and belief." The compromise was approved by the Court, under whose supervision the liquidation proceeded, and B was discharged. In 1882 a limited company known as the Assets Company was formed, which took over the assets of the bank. B died in 1882. In 1901 the Assets Company raised an action against B's trustees concluding

for reduction of the interlocutor whereby the liquidators' compromise with B was sanctioned, and of the discharge granted by them in his favour. The pursuers relied, *inter alia*, upon facts which were revealed in the inventory of B's estate given up by his executors, which was duly recorded in 1883, in which promissory-notes granted by two of B's sons in his favour prior to the liquidation of the City of Glasgow Bank were entered as assets, which promissory-notes were not included in B's statement of his affairs above referred to. The pursuers also relied on facts disclosed in the inventory given up by the executors of B's widow, who died in 1888, with regard to a share in the testamentary estate of a relative which was not then payable, but which had vested in her, and so, as was alleged, in *B jure mariti*, prior to the liquidation of the bank. There was no mention of any expectancy in B's statement of his affairs. The defenders maintained that the promissory-notes were taken by B in evidence of advances to patrimony, and were not regarded by him as documents of debt; and that his alleged rights *jure mariti* were not within his knowledge and belief; and that the action was barred by *mora*.

In a Court of Seven Judges, *held* (after a proof, *rev.* judgment of Lord Kyllachy, Ordinary—Lord Young and Lord Moncreiff *diss.*) that the pursuers were entitled to decree of reduction—*per* the Lord President and Lord Trayner (the Lord Justice-Clerk and Lord Adam concurring) on the ground that it was sufficient for the pursuers' case that it was (as they held) established that B's statements were not true in fact; *per* Lord Kinnear, on the ground that although it was necessary for the pursuers to prove not only that B's statements were untrue in fact, but also that they were untrue to his knowledge and belief, yet they had established this latter point.

*Question*, whether it was necessary to the pursuers' case to prove that B's statements were made fraudulently.

*Observations* on the plea of *mora*.

*Opinions* (*per* Lord Kyllachy, Ordinary, and Lord Moncreiff) that that plea was well founded.

This was an action at the instance of the Assets Company, Limited, which acquired the assets of the City of Glasgow Bank from the liquidators of the Bank in 1882 (in terms of the City of Glasgow Bank (Liquidation) Act 1882 [45 and 46 Vict. cap. ciii]), against William Bain and others, the surviving testamentary trustees of William Bain, sometime manager of the City of Glasgow Bank in Edinburgh, and thereafter joint-cashier of the Bank of Scotland there, and against certain of the beneficiaries under the deceased Mr Bain's settlement "for any interest they might have." Mr Bain was a contributory of the bank, and the summons concluded for reduction of (1) an interlocutor of 18th

March 1879, whereby the First Division sanctioned a compromise carried out by the liquidators of the bank with Mr Bain, and (2) an agreement and discharge dated 30th April 1879 executed in pursuance of that interlocutor; there was further a conclusion against the defenders "as trustees foresaid" for payment of £63,787, 13s. 4d., "reserving always to the pursuers all claims competent to them against any other persons liable to them in the premises."

Mr Bain died in November 1882, leaving a trust-disposition and settlement, the trustees under which, of whom the defenders first called were survivors, were discharged by the beneficiaries on fulfilment of the trust purposes in 1888. The present action was raised in 1901.

The discharge granted by the liquidators of the bank in favour of Mr Bain proceeded on the following narrative, *viz.*—"That whereas the first party is a partner of the said bank, and as such has been placed upon the list of contributories thereof as a holder of £1200 of the capital stock thereof; and whereas the said liquidators have made calls upon the contributories of the said bank in order to provide funds for the payment of the debts thereof, and the first party has represented to the said liquidators that he is unable to meet the demands so made upon him to any greater extent than has already been paid or secured to the said liquidators; and the first party has made and verified by a solemn declaration, and delivered to the said liquidators, in answer to certain printed queries which they addressed to him, a written statement of his affairs, means, and property in possession or expectancy, and has agreed to grant to them the assignment underwritten; and whereas, on the basis and on condition of the truth, accuracy, and completeness of the said statement of his affairs, means, and property, the said liquidators intimated their readiness to agree to accept the payments or securities which have already been made or secured to them by or on behalf of the first party as a compromise of the claims against him as a partner of the said bank, and to execute a discharge in his favour accordingly; and whereas by interlocutor, dated the eighteenth day of March Eighteen hundred and seventy-nine, the authority and sanction of the Court of Session, under whose supervision the liquidation of the said bank is being carried on, was interposed to the said agreement for compromise and discharge."

The "solemn declaration" referred to as having been made by Mr Bain was in the following terms:—"I, William Bain, late manager, City of Glasgow Bank, Edinburgh, do solemnly and sincerely declare that the several matters and things mentioned and contained in the answers written upon the preceding page, and which are signed by me as relative hereto, are true and correct answers to the printed queries prefixed thereto, to the best of my knowledge and belief."

That declaration was appended to a form which the liquidators required to be filled

up by all parties who were unable to meet a call, and who applied for a present discharge in full of all claims by the liquidators, which in Mr Bain's case was filled up as follows:—“*Answers and Declaration by the late William Bain.*—Excerpt from Minute of Liquidators of the City of Glasgow Bank, of date 18th November 1878—*Resolved*— . . . 3rd. That any discharge to be granted shall proceed on the truth of the declaration emitted by the applicant, any untrue statement made therein being held to invalidate the discharge. . . . Mr William Bain.—Call of £500 per £100 of stock on £1200 stock made on 13th November 1878. . . . 2. What property do you possess, and what is its nature and value to the best of your knowledge and belief? (Specify the particulars, if necessary, in the separate signed list or schedule marked A, and accompany the statement with valuations, certified rentals, and other evidence of value by competent parties.)—*Ans.* (No property.) Certificates of stocks held. See Schedule A. . . . 4. What is your regular or average annual income, and from what sources is it derived? (Specify the particulars, if necessary, in the separate signed list or schedule marked B.)—*Ans.* £1200, as manager of City of Glasgow Bank, Edinburgh. . . . 6. Have you any expectation of funds or property of any kind coming to you by succession or otherwise? If so, state its nature and probable value.—*Ans.* None. . . . 7. Have you, since 1st October 1878, paid any debts previously due by you, and have you paid any debts contracted, or for which bills or other vouchers have been granted by you since 1st October 1878? If so, state the particulars of such debts and payments.—*Ans.* Have paid tradesmen's accounts amounting to £321, 19s. 3d. . . .

“*Schedule A.*”

|  |           |
|--|-----------|
| 175 shares in Standard Investment Company, selling at this date at £2, 6s. per share | £402 10 0 |
| 50 shares of the Imperial Credit Coy., Ltd., surplus certificates, price paid        | 340 0 0   |

“*Statement of Mr William Bain's Effects at this date.*”

|  |             |
|--|-------------|
| 175 shares in Standard Investment Coy., at £2, 6s. per share       | £402 10 0   |
| 50 shares, The Imperial Credit Coy., Limited, surplus certificates | 340 0 0     |
| Furniture, p. valuation  | 168 13 0    |
| Life policy, surrender value                                       | 709 10 0    |
| Cash at credit of a/c in bank                                      | 235 0 0     |
| Cash to be paid down   | 600 0 0     |
|  | £2455 13 0” |

The £600 of “cash to be paid down” was the balance remaining in Mr Bain's hands of £1000 withdrawn by him from current account with the bank the day before the doors were closed.

The pursuers averred that, as appeared from an inventory of Mr Bain's estate lodged by his trustees in 1883, he was at the date of the liquidation of the bank in possession of two promissory-notes for £300

and £200 respectively, granted by his sons James and William Bain, and that he fraudulently omitted these promissory-notes from the statement of his means and effects quoted above. On an order for the pursuers to answer the defenders' statement of facts the pursuers added an averment to the effect that Mr Bain had also concealed a reversionary interest belonging to his wife in the estate of Mr Potter of Glenlee, which, as they alleged, had vested in him *jure mariti*. This reversionary interest was included in the inventory lodged by the trustees of Mrs Bain, who died in 1888. In answer to the plea of *mora* the pursuers averred that they had only recently become aware, as the result of inquiries, of the concealments which they alleged. The further averments of the pursuers and the development of their case are detailed in the opinion of the Lord Ordinary (Kyllachy) annexed to his interlocutor of 22nd February 1902, *infra*.

The pursuers pleaded—“(1) The answers and declaration condescended on having contained statements which were not true, accurate, and complete, the said interlocutor and the discharge following thereon are invalid and reducible, and should be reduced as concluded for. (2) The said agreement and discharge having been granted on the basis and on condition of the truth, accuracy, and completeness of the statement of his affairs, means, and property by the said William Bain contained in said answers and declaration, and the said William Bain having failed to fulfil the said conditions as condescended on, the discharge is not binding on the pursuers. (3) The said compromise having been sanctioned, and the interlocutor sought to be reduced, having been pronounced under essential error, induced by the false and fraudulent representations and concealment and suppression by the said William Bain of material facts as condescended on, the same should be reduced. (4) *Separatim*. The said William Bain having fraudulently concealed (a) estate and effects belonging to him, and (b) estate and effects belonging to his wife which were vested in him *jure mariti*, and having thereby induced the liquidators of said bank to enter into the agreement and discharge libelled, and to obtain the sanction of the Court thereto, the pursuers, as now in right of the said liquidators, are entitled to decree of reduction as concluded for.”

Defences were lodged by Mr Bain's trustees and by Mr William Bain as an individual. It is sufficient to notice the pleas of the former defenders, which were as follows:—“(1) The pursuers' statements being irrelevant, the action should be dismissed with expenses. (2) The pursuers are barred by *mora* and taciturnity from insisting in their present claim. (3) It being impossible for the pursuers now to give *restitutio in integrum, et separatim*, the pursuers having suffered no prejudice, the defenders should be absolved from the reductive and accounting conclusions of the summons. (4) The pursuers' statements, so far as material, being unfounded in fact,

the defenders should be assolizied from all the conclusions of the summons, with expenses. (5) The said William Bain not having been guilty of fraud, the defenders are entitled to decree of absolvitor with expenses. (6) The answers and declaration condescended on having been true, accurate, and complete, the defenders should be assolizied from the reductive conclusions of the summons. (7) *Separatim*. The answers and declaration condescended on having been superseded by the independent investigations of the liquidators of the City of Glasgow Bank, and the said agreement having been executed as the result of a transaction between the said liquidators and the said William Bain on terms not contained in said declaration and answers, the defenders should be assolizied from all the conclusions of the summons with expenses. (8) The defenders having *bona fide* distributed the whole estate of the said William Bain and been duly discharged for their intromissions, ought to be assolizied from the pecuniary conclusion of the summons, with expenses."

On 22nd February 1902 the Lord Ordinary pronounced the following interlocutor:—"Sustains the first and second pleas-in-law for the defenders, and assolizies the defenders from the conclusions of the action, and decerns," &c.

*Opinion*.—"The pursuers of this action are a limited company known as the Assets Company, which was formed in 1882 to take over the assets of the City of Glasgow Bank. The defenders are the trustees of the late Mr Bain, who was a shareholder of the bank, and who, having compounded with the liquidators on the footing of a surrender of his estate, was discharged on payment of an adjusted sum. The object of the action is to have the discharge so granted reduced, and to restore in favour of the pursuers, and as against the defenders (Mr Bain's representatives), the original liability attaching to the deceased as a contributory in the liquidation. The grounds of reduction are (1) that Mr Bain concealed from the liquidators the existence of two promissory-notes for £300 and £200 respectively, granted to him by two of his sons in connection with advances which he had made to them; (2) that he also concealed the existence of a certain reversionary interest said to be possessed by his wife in the residue of the estate of a relative, which interest it is suggested fell in point of law under his *jus mariti*.

"The sum paid by Mr Bain was, I may explain, £2473, being the adjusted value of his whole estate as set out in a declaration made by him, with the addition of a sum of £400 which was for some time in controversy. The total sum due in respect of calls was £33,000, and for this sum the pursuers now ask decree against the defenders—the effect, if they obtain such decree, being, that the defenders will have to account to the pursuers for the whole trust estate as realised and administered on Mr Bain's death in 1882—reserving, for what it is worth, their (the defen-

ders') right of recourse against the beneficiaries.

"The defenders maintain various defences on the merits. They deny that the two promissory-notes represented recoverable debts. They deny separately that there is any proof or presumption that the same were not (for what they were worth) disclosed to the liquidators. They maintain further, as regards Mrs Bain's reversionary interest, that it was not at the date of the discharge a vested interest, and that in any view it occurred to nobody at the time or afterwards to consider or treat it as belonging to Mr Bain. But further, and *ante omnia*, they contend that the pursuers' claim—as a claim against Mr Bain's representatives—is barred (as they put it) by *mora* and taciturnity; that is to say, by unjustifiable delay in bringing the claim forward, coupled, the said delay, with prejudice thereby caused to the defenders' position. They contend further that the action being what it is, and brought in such circumstances, the Court ought not to put them (the defenders) to the anxiety and expense of a proof, but should dismiss the action at once as an action which should not be entertained.

"I have had much difficulty in coming to a conclusion as to the procedure. For it is certainly not usual to dispose of questions such as are here raised otherwise than upon a concluded proof. But I have been much impressed by the extreme hardship of the defenders' position, and not less by the unfavourable features—the combination of unfavourable features—which to my mind the pursuers' case presents. And I have in the end come to think that there is enough within the record and the admitted documents to justify me in throwing out the action, which I accordingly propose to do.

"I may in the first place point out certain facts, and particularly certain dates, which are all admitted, and which shew in what circumstances the action is brought:—

"1. The discharge challenged was, as I have said, granted in 1879. Mr Bain died in 1882. On his death the defenders gave up an inventory of his estate; and that inventory was duly recorded, and being so, was of course open to inspection. The inventory contained full particulars both as to dates and amounts of the two promissory-notes now in question.

"2. Mrs Potter, the liferentrix of the fund in which Mrs Bain had a reversionary interest, died in 1885, and on her death Mrs Bain received payment of the bulk of her share of the fund. The remainder continued to be held by the trustees of Mr Potter, to secure a certain annuity. Mrs Bain died in 1888, and on her death her executors gave up an inventory containing a full statement of her estate, and in particular the following entry:—"One-third of the residue of the deceased Alexander Potter of Glenlee, near Hamilton (who died 30th June 1868), the value of which being contingent on the death or marriage of an annuitant thereon, cannot at present be ascertained."

"This inventory was also duly recorded, and thus from 1888 downwards was open to the pursuers.

"3. The present action was not brought until June 1901, and as brought it was rested solely on the alleged discovery (as the pursuers say, at a 'recent period') of the existence of the two promissory-notes by Mr Bain's sons. There was no mention of Mrs Bain's reversionary interest—none whatever. There was, however, a statement that the pursuers had (also 'at a "recent" date') discovered that Mr Bain had at his death in 1882 left estate, as disclosed in his inventory, of the value of £3254; and apparently in this connection it was averred (in general terms) that besides the two promissory-notes Mr Bain had concealed from the liquidators assets at least amounting to £3000.

"So matters stood on the summons. The claim was rested entirely on the alleged discovery that Mr Bain had left in 1882 over £3000, and particularly had left the two promissory-notes by his sons, which were given up as part of his estate.

"Defences, however, were in due course lodged, and then a curious thing happened. The defences contained a full and, if true, satisfactory explanation as to the sources of the £3254 which appeared in Mr Bain's inventory. And as the particulars of that explanation seemed capable of easy verification, I thought it right that the pursuers should answer the defenders' statement. Accordingly I continued the adjustment of the record over the long vacation, expressly, as the interlocutor bears, for that purpose. Nevertheless, when the case came up for closing in October, what appeared was this. The pursuers had answered the defenders' statements by a simple 'not known and not admitted,' but they had introduced on adjustment an entirely new ground of reduction, viz., the alleged concealment of Mr Bain's right *jure mariti* to the reversionary interest in Mr Potter's residue possessed by his wife.

"It will thus be seen (1) that the pursuers' action was brought twenty-two years after the date of the transaction challenged; (2) that it was brought twenty years after Mr Bain's death and after the particulars of the estate left by him had been disclosed by his inventory; (3) that it was brought thirteen years after Mrs Bain's death, and after the disclosure in her inventory of her interest in Mr Potter's estate; (4) that this last matter was only, as I have said, brought up at the adjustment of the record, and after it had been apparently found impossible to meet the defenders' explanations as to the other part of the case.

"Now, such being the circumstances in which the pursuers come into Court, what is the position in which the action finds the defenders? Taking (as of course at this stage I must) the pursuers' statements and the documents which they produce or admit, the following facts amongst others stand out:—1. Mr Bain is dead. His wife is dead. Of the four liquidators, three are dead. Of the four Judges who sanctioned the discharge, three are dead. Had the

pursuers postponed their action for a few years longer there would probably be no person living who knew anything of the facts. As it is, the defenders say that Mr Bain's private papers have not been preserved, and that the friends whom he consulted at the time are now dead; and this seems at least highly probable. In any case loss of evidence is to some extent certain, and how far that loss extends and with what result no one can tell. 2. Further, Mr Bain's estate has for many years been wound up and divided among the beneficiaries. So also has Mrs Bain's estate, including in that estate the proceeds of the alleged reversionary interest. Of the beneficiaries amongst whom the two estates have been divided, some, at all events, are out of the jurisdiction. And how far the amounts paid to them can be recovered, or how far some of them may have the benefit of prescriptions shorter than ours, cannot be known. In any case, money must have been spent which would not have been spent. Engagements must have been made which would not have been made. One family agreement in particular, involving the expenditure of about £1000, is mentioned on record and is not disputed. New interests in many ways must have arisen. In short, matters are not and cannot be now entire.

"These being the facts, I know of no case in which under such circumstances an action like the present has been entertained. The law applicable has often been stated, and speaking generally it comes to this,—that a pursuer who has a cause of action, and particularly a cause of action like the present, must bring his action within a reasonable time—at all events, must do so if delay is fitted to prejudice his opponent's position. The defence thus arising may be variously described. It may come under the head of *mora* or under the head of bar. But in substance its requisites are what I have stated, and I am of opinion that we have these requisites here."

The pursuers reclaimed, and on 13th January 1903 the Second Division recalled the interlocutor reclaimed against, and remitted to the Lord Ordinary to allow a proof before answer of the pursuers' averments as to the concealment of the promissory-notes above referred to, and Mr Bain's right *jure mariti* in the reversionary interest in Potter's estate possessed by Mrs Bain.

In the following opinions delivered at advising, the other case referred to by the Judges was the case of *Assets Company v. Phillips' Trustees*, in which the defenders pleaded "No title to sue." It is reported as the immediately succeeding case:—

LORD JUSTICE-CLERK—The Assets Company, under authority of a Special Act of Parliament, took over from the liquidators of the City of Glasgow Bank the assets on which the liquidators might have claims against contributories who were liable to pay the debts of the bank. In the two cases before the Court the Assets

Company seek to reduce agreements of compromise of claims made with two of the contributories, on the ground that at the time of the agreement the contributories in question did not make a full and fair disclosure of their estate in certain particulars, but concealed assets in fraud of the liquidators' claims. That the liquidators, had they remained in the exercise of their powers, could have pursued such actions I have no doubt, and I also have no doubt that the Assets Company, as coming in their place, have the same title to follow funds which would have been liable to be impounded in the liquidation if such are discovered not to have been disclosed when the contributory took a discharge from the liquidators, upon the footing that he had disclosed and given up the estate of which he was master. Upon the question of title the cases quoted by the pursuers appear to me to be conclusive, and the case of *Falla's Trustees* seems also to be conclusive upon the question whether trustees who have been discharged can be called in such an action. But it was strenuously maintained that no right to raise such a case as this now existed, in respect that by delay and taciturnity the pursuers had lost their remedy. The arguments in favour of this contention were listened to by me attentively and anxiously, but they failed altogether to bring conviction to my mind, the question, and the only question, being whether the pursuers should have opportunity to prove their case, subject to the whole matter being dealt with on any ground in law that could be successfully put forward when the facts of the case had been investigated by proof? The pleas set forward by the defenders in both the cases are certainly pleas which cannot be successful where no prescription has run, unless it be in very exceptional cases, and the whole trend of the decisions is towards declining to throw out a case on preliminary pleas based on such grounds. I may refer to the case of *Shirres*, which was also a case at the instance of the Assets Company, as an illustration, and I find it difficult to see on what ground these cases can be thrown out at the present stage if *Shirres's* case was rightly decided. I think that case was rightly decided.

It remains only to consider whether the title being good, and the actions not barred by the pleas I have referred to, the pursuers have stated a relevant case for inquiry. In the case of Bain there are two averments which are I think undoubtedly relevant to the same effect. The one is that two obligations for debt in the form of promissory-notes were not given up by the deceased contributory among his assets, which were afterwards on his decease given up in the inventory of his estate as debts due to him, and on which certain sums of interest were paid by his sons, who were the obligants in the notes. That is, as I think, an averment of fact entitling the pursuers to an allowance of proof. What may turn out upon the proof to have been the detailed facts is a different matter, but

I cannot hold that it does not afford ground for a remit to proof. The other averment, which is I hold relevant, relates to a sum of £7870, to which it is alleged the contributory had right through his wife. I cannot doubt that the concealment of such a sum by a person bound to make a full disclosure of assets to which he had beneficial right, and the taking a discharge upon the footing that he has fully disclosed, may constitute, if proved, a ground for reducing the discharge.

I am on these grounds unable to concur in the view of the Lord Ordinary on the case of Bain, and I am in favour of allowing a proof of these averments to which I have referred. . . .

LORD YOUNG—In the case of Bain there is no plea against the title to sue, while in the other case there is. I have no doubt of the title to sue. It is not necessary in the case of Bain to pronounce any decision upon it, there being no plea. In the other case I concur in the interlocutor repelling that plea. I think in the case of Bain there was very properly no objection to the title to sue. This is an out-of-the-way case; it is really unprecedented, I should say, in all respects, and I may say a word about it in order to guard myself against any misapprehension in agreeing with the proposal to allow a proof before answer, that is say, a proof before answer upon the question of relevancy. I am taking the case of Bain alone at this moment. The Lord Ordinary's judgment is to the effect that the two pleas-in-law for the defender against the relevancy are sustained; there is no other judgment before us. Now, the case of the pursuers is in substance this, and I shall state it very generally:—William Bain, whose representatives are the defenders, died twenty years ago. He was a shareholder, and therefore a partner, of this Glasgow Bank, which went into liquidation in 1878. The state of its affairs was, fortunately for the creditors, such that although the assets of the bank—that is to say, the property, heritable and moveable, were considerable, the heritable property being valuable, and also the funds in hand and debts due to them—were insufficient to meet the claims of the creditors, yet the shareholders were quite able to meet, and did meet, all the debts of the bank; and when the bank went into voluntary liquidation, but under statute and subject to the supervision of this Court, it was really for the purpose of ingathering the assets of the bank—that is to say, realising their property and calling in the debts due to the bank in the most advantageous manner, and calling upon those shareholders who were either unable or unwilling to contribute in order to meet any deficiency of the assets to pay the creditors, so that there might, according to their shares, and so far as possible, be an equal contribution by all the shareholders. That was the purpose of the liquidation. It began in 1878, and, so far as I can see, it terminated in 1882. The bank is now dissolved, and of course out of liquidation,

and indeed of existence, and the liquidators out of office and discharged, and some or it might be all of them dead; but in 1882 the then existing liquidators, and certain other parties who agreed with them, obtained an Act of Parliament under which—and it could not have been done otherwise—the assets of the bank were, in so far as not realised by the liquidators, transferred to the Assets Company, which was constituted by this statute in June 1882. Now, in 1878 the liquidators, as was their duty, called upon the shareholders who had not contributed to meet the deficiency of assets to pay the creditors of the bank. They called upon each individually to pay what the liquidators thought he was bound to pay as the amount of contribution which, looking to the amount of his shares, he ought to make, and in the discharge of this duty, and with the approbation of the supervising Court, they called upon Mr Bain in 1878 to contribute, I suppose, £60,000, for that is the sum concluded for in this action—but, no matter what the amount was, the liquidators were authorised, not only by the shareholders of the bank, by the bank itself, but authorised by this supervising Court, to enter into an arrangement with any shareholder as to the amount of his contribution, and they did in 1879 enter into such an arrangement—such an agreement with Mr Bain—proceeding upon a communication by him to them of the amount of his available estate, out of which alone he could pay any contribution, and I think the result of their agreement with him was that the amount of the contribution which the liquidators thought he ought to pay was £2700. He paid that to them, and thereupon he was discharged by them and relieved by being displaced from his position as a shareholder of the bank. The agreement provided that he should cease to be a shareholder of the bank or to have any liability as such, and should be discharged of any claim against him for contribution. Now, the liquidators could not do that, and did not do it, without the authority of the supervising Court—that is, this Court—and they accordingly, as the record here bears, made an application to the Court setting forth their arrangement or agreement with Mr Bain, and asking the Court to consider it, and if they saw fit, to approve of it, and the Court did pronounce a judgment to that effect in the same year, 1879, and the judgment of the supervising Court, the decree by which it approved of what the liquidators had done in that matter, is one of the things sought to be reduced in this action.

Now, it does not appear to me to be clear that the liquidators while they existed could have brought a reduction of their agreement, and of the decree of the Court approving of it. I do not say that they could not, but I am not prepared to say that they could, but certainly they did not; and in 1882 all the debts of the bank were paid and the bank was dissolved. It went out of liquidation, and the assets of the bank which was to be dissolved, and which was immediately dissolved, were trans-

ferred to the Assets Company, and we have in this case to consider what is the true construction of the statute by which that company was created. Now, the pursuers here—the Assets Company—in 1901, that is, nearly twenty years after the dissolution of the bank and the payment of all its debts and the liquidation ended, bring this action. It was brought I think in June 1901, not against Mr Bain, who had been dead for about twenty years, but against the trustees of his will and one of his representatives who had received part of his estate under the will, and the question is, whether or not the pursuers have set forth a relevant case? Their case is, that when the Act of 1882, by which they were constituted, was passed, the liquidators were in a position, upon such facts as are averred in this record, to reduce the arrangement with Mr Bain, including the decree of this Court, by which it was approved of and confirmed, and that this right in the liquidators was by the Act transferred to the pursuers. This involves two questions, upon neither of which we can now pronounce any decision. These are—first, the right and duty of the liquidators while they held office and acted as such; and second, the construction of the statute regarding the transference to the pursuers. There is certainly a title to sue, because any person must have a title to sue a relevant case stated by him which entitles him on proof of his statement to a decree for £63,000 or for any sum against the party called as defender. There must be a title to sue, but in order to succeed in the suit it must be shown to our satisfaction upon the relevancy—which we have not decided and are not now deciding—that the pursuers' construction of the Act, giving them the right which they assert, is sound. I do not mean the title to sue, but a right to the money which they are suing for. If their action is relevant, and they shall prove the facts averred, then they say they are entitled to decree against the defender for £63,000. Their claim will be decided according to our judgment upon the construction of the statute and upon the evidence of the facts. If we should find their case to be relevant, and if they support the relevancy in point of law and support the statements of fact, to say that they have no title to sue the action would appear to me to be an untenable proposition. They may fail in the action, and I can see grounds upon which it may be at least plausibly maintained that they ought to fail, but they are nevertheless entitled to sue and have the points which they present as their grounds of claim, whether in law or in fact, adjudicated upon.

I am therefore—guarding myself against deciding anything more—prepared to remit this case to the Lord Ordinary for proof before answer. I do not know that the words “before answer” are necessary. I suppose all the debts of the bank have been paid, and I have proceeded on that assumption. There is a provision in the Act of Parliament to the effect that if the liquidators should find themselves in the position of

having more than sufficient to pay the debts of the bank, they should hand over the surplus to the Assets Company. Therefore there is no interest in anybody in the matter of this action—that is to say, the liability of the trustees and one of the sons of the deceased Mr Bain to make payment—and it is not suggested that anybody could interpose or claim other than the Assets Company. If they have a right they will get that right satisfied, and if they have no right, then it will be so found. There is no suggestion, and there could not be, that there is any other party having a right in the matter, the bank being dissolved and the liquidation ended.

LORD TRAYNER—As these cases are to go back to the Lord Ordinary for proof I abstain from making any reference to the special facts more than is absolutely necessary for the decision of the question which is directly before us. The case of Bain does not stand on the same footing as the other, and therefore I shall take it separately. In that case there is no objection to the title to sue and therefore I say nothing about that. The Lord Ordinary has refused a proof and has assoilzied the defenders on grounds which appear to me to be deserving of, and which will certainly receive, serious consideration when the proof is completed, but none of the grounds which his Lordship has put forward in the note that he has appended to his judgment seem to me at all relevant to the question whether or not an inquiry should be made, and I am clearly of opinion that there is no ground in the present case for excluding inquiry. Upon the relevancy of the case I think there was a good deal of argument, but I am not unwilling, in order to save difference of opinion, to take it that at present we are deciding nothing upon the relevancy. I think, however, it is necessary to distinguish very distinctly between the question of no title to sue and no title to recover. I assume that in Bain's case the Assets Company have a title to sue, because no one has said that they have not. It has been decided by this Court in more than one case similar to the present that the company have a title to sue. Whether they have a title to recover will depend entirely on whether the facts which they have averred are sufficient to impose liability on the defenders, and if these facts are admitted or proved the pursuers will be entitled to decree, but I do not think the question of relevancy interferes in the least with the plea as to title to sue. It is not necessary to affirm it in Bain's case because nothing to the contrary has been pleaded. . . . Your Lordship has suggested in Bain's case that the proof should be limited to the specific averments of the two promissory-notes, and the right which the late Mr Bain had during his lifetime in the estate of a relative of his wife. I should have been quite disposed to adopt the course taken in *Shirres's* case and to have allowed to the pursuers a proof of their averments without restriction, but I am

not unwilling to consent to the restriction which your Lordship has proposed, simply for the reason that if the pursuers are able to prove the specific averments that there was £500 or £5000 concealed from the liquidators at the time of the agreement that would or might be sufficient for their purpose. I am of opinion that the Lord Ordinary's interlocutor ought to be recalled, and a proof allowed to the pursuers of their specific averments "before answer," if the Court think it right, or without these words if the Court should think them unnecessary. . . .

LORD MONCREIFF—I agree with all your Lordships that the pursuers have a title to sue. I think that is settled by two cases—the case of the *Liquidators of the City of Glasgow Bank v. The Assets Company*, in 10 Rettie, and the later case in this Division, *The Assets Company v. Shirres*, in 24 Rettie. In the first of these cases the Lord President puts it thus on page 679:—"Cases of fraud, I should rather imagine, will not be numerous, and I entertain a tolerably strong opinion that nothing short of fraud would induce the Court to set aside any of these discharges. Still, whatever the value of these documents may be, the Assets Company are, in my opinion, plainly entitled to the possession of them." The pursuers therefore having a title to sue this action, the question which we have to consider, and which was argued before us, is, whether they have set forth a relevant ground of action? On that matter I am willing that, under reservation of all pleas of parties except as to title, a strictly limited proof should be allowed in both cases. I may say that I think, especially in the case of Bain, such an inquiry, leaving everything open except the question of title, will be in the interests of the defenders themselves as well as of the pursuers.

In the case of Bain the two matters as to which I understand inquiry is to be allowed are, first, the two promissory-notes, which *prima facie* are documents of debt, and which undoubtedly were not given up by Mr Bain; and the other matter as to which inquiry is to be allowed is the bequest which came to Mr Bain's wife from a relative, and which, it does not seem to be disputed, vested *jure mariti* (whether he knew it or not) in Mr Bain at the time when he obtained his discharge from the bank. The defences in the case of Bain are of the most candid kind. It is only upon these two points that I understand inquiry is to be allowed. After proof has been led, it will be open to the defenders to found both upon the lapse of time that has occurred since the discharge was granted and consequent loss of evidence, and the necessity of proving what amounts to fraud on the part of Mr Bain before that discharge can be reduced. . . .

Proof was duly led. The nature of the parole evidence adduced and the contentions of parties sufficiently appears from the opinion of the Lord Ordinary *infra*, and the opinions in the Inner House.



Of the documentary evidence put in it is sufficient here to notice the following letter from Mr Bain to Mr George Auldjo Jamieson, C.A., who was one of the liquidators, with reference to the balance of the sum of £1000 withdrawn from current account by Mr Bain the day before the bank stopped payment, over and above the £800 "cash to be paid down" referred to in the statement of his effects at the date of his declaration, viz.—  
"6th March 1879.

"G. Auldjo Jamieson, Esq.

"Dear Sir,—Referring to our conversation on Monday afternoon, I have now to intimate that I have succeeded in getting the £400, and while still of opinion that I had a right to pay my accounts, I am prepared to pay you back the £1000 drawn out of my account, the value of my furniture, and the surrender value of my life policy, on the understanding that you grant me my discharge with the first names to be passed.—I am, very truly yours,—W. BAIN."

In support of their contention that the promissory notes granted by his sons did not represent recoverable debts in the mind of Mr Bain, the defenders produced the following letter:—  
"6 Coates Gardens,  
Edinburgh, 10th November 1882.

"My dear James,—This morning I got by post a receipt for rent of this house paid up till to-morrow. Now I know this is your doing, or yours and Willie's, but I have not had an opportunity of speaking to him about it yet. In the first place I must say it is very kind of you, and more than ever I could have thought of your doing for me, but at the same time, and as I said to you when the subject was discussed before, if I can live and pay the rent out of what I have it is not fair to take it from you or any friend I have; of course I cannot say yet how the incoming will meet the outgoing; a year will be required to test this, but I think there should be a balance in my favour, or I will be dreadfully disappointed. You are aware I daresay that Willie is to pay £70 for board. If I cannot keep the boat's head to the wind with my own and this, then my right hand hath lost its cunning, and the William Bain who could live on £40 a-year and save money is no more. We will say no more about this till another six months come round, when I will be better able to judge, and in the meantime you will accept my warmest thanks; your kindness and consideration is more than I can write about; it goes to the most tender part of my heart and fairly overcomes me. God bless you my dear boy."

On 13th June 1903 the Lord Ordinary assoilzied the defenders.

*Opinion.*—"When this case was formerly before me I held that enough appeared upon the admitted facts to exclude the action either as against the trustees or as against the beneficiaries called for their interest; that is to say, I held that the action was excluded by the long and undue delay in bringing it, and the prejudice which had thereby arisen to the defenders' position. On reclaiming-note it appeared to the Inner

House that even on this initial question the exact facts should be ascertained, and also that the inquiry thus necessary should comprehend the whole matter relevantly at issue. A proof having accordingly been allowed, it was lately led, and the case is now in the position of a concluded cause.

"In the view which I have come to take on what I may call the merits of the pursuers' claim, it is not perhaps necessary that I should deal at length with the whole defences maintained by the defenders; but as the argument which I lately heard traversed the whole ground, and as at least on one point there appears to have been misunderstanding, due, I am afraid, mainly to some language of my own in a recent judgment, I think it may be well that I should deal generally with the whole case.

"The defenders' first contention was this, that assuming everything else in the pursuers' favour, it was now established, if it did not before appear, that at least as against the defenders (Mr Bain's trustees) the action was met by a good defence. The trustees are, it will be observed, called upon to bring with them, exhibit, and produce the discharge granted to the truster, of which reduction is sought, and to hear and see the same reduced and declared void; and that being done, decree is asked against them, as the deceased's trustees, to make payment to the pursuers of the sum of £63,187, 'reserving always to the pursuers all claims competent to them against any other persons' (i.e., the beneficiaries afterwards called for their interest) 'liable to them, the pursuers in the premises.' The assumption of the action therefore is that the trustees are still possessed of the whole or part of the trust estate, and have at least still duties with respect to it and to its ingathering and administration—duties which the pursuers as alleged creditors are entitled to enforce. And, perhaps, until the contrary appeared, the pursuers were entitled to make that assumption. But the question now is whether the assumption was well founded. The trustees maintain the contrary. They say, and I think have established, that they long since ceased to have any connection with the trust estate; that they long ago administered and distributed it in due course; and that having done so, they were formally and fully discharged, not indeed judicially as under a multiplepointing and exoneration, but by—what is equally good—an extra-judicial discharge granted by the whole beneficiaries. They say that they are thus *functi officii*—that they have no longer any duty or, for that part, any title to sue actions or ingather assets—and that their position is in effect that merely of mandatories whose mandate has been executed and has expired. They further point out that, as affirmed by numerous decisions, the remedy of a creditor who has omitted to claim during the subsistence of a trust is (at all events in the absence of any suggestion of malversation) to proceed against the beneficiaries direct, each beneficiary being liable just in the same way as if he had accepted

directly a gratuitous conveyance from the deceased truster.

"Now, the pursuers do not dispute that all this is true. They make no suggestion of malversation. They disavow any intention of using their decree, if they get it, to the effect of establishing as against the trustees any personal liability. They do not ask that the trustees shall resume their trust and proceed against the beneficiaries. As their summons bears, they propose to do that themselves. In short, they do not suggest that the decree which they ask, if they get it, could be in any way put in force. But what they maintain seems to be this—that they are entitled, as against the trustees, to what they call a decree of constitution, by which I suppose they mean, not an ordinary decree of constitution, which is, of course, always enforceable, but a decree *cognitionis causa tantum*—a decree which, as we all know, is granted in a particular case, viz., where an heir, who, being liable for his ancestor's debts if he accepts the succession, renounces the succession, and by doing so leaves the estate open to the diligence of the ancestor's creditors. In that case there is no doubt granted a decree of constitution *cognitionis causa*. But the decree is granted against the heir, the person who has or had the beneficial interest; and its purpose is simply to ascertain that the person having the beneficial interest does not dispute the debt.

"The question therefore is, whether that is the kind of decree which the pursuers here really ask, and if so, whether they are entitled to get it?

"Now, I am of opinion that they are not. Whatever it may be called, the decree here sought is, unless I entirely misunderstand the matter, quite unnecessary for the pursuers' purpose. They do not require anything of the kind to enable them to go against the beneficiaries, who are their true debtors, if they have any. But further, and in any case, the decree sought would be futile. It could establish nothing against the beneficiaries. Although the trustees appeared and litigated, no judgment obtained against them would be *res judicata* against the beneficiaries, or indeed against anybody. And that really is, it appears to me, to be the test of the matter.

"It seemed, no doubt, to be suggested that testamentary trustees are always trustees for the creditors of the deceased, and so cannot be discharged until all the creditors are paid; but that is an error which was corrected so far back as the case of the *Globe Insurance Company v. Scott's Trustees*, 11 D. 613, 7 Bell's App. 296. The trustees and executors of a deceased stand in no fiduciary relation to his creditors. They are simply debtors—debtors with limited liability, but still only debtors just as the deceased was a debtor; and their liability, such as it is, terminates when the creditors having omitted to come in and claim, they have in due course paid away the estate to the beneficiaries. All this is explained at length in Lord Fullarton's judgment in the case referred to, the

decision in which was affirmed in the House of Lords.

"It therefore appears to me that the trustees here are entitled to be assoilzied, and to be so whatever may be the result of the action as against the beneficiaries. And indeed I doubt whether the contrary would have been seriously maintained were it not for a supposed decision of the point in the case of the *Assets Company v. Falla's Trustees*, or perhaps rather for a gratuitous and, I am afraid, not well-considered observation in my own judgment in that case—an observation not essential to the judgment, but which somehow escaped correction in the Inner House.

"In the case of *Falla's Trustees*—as in the present case—there was a conclusion against testamentary trustees for reduction and payment. There was also (in a supplementary action which was conjoined) a conclusion for reduction against the beneficiaries. The main and only important question in the case was as to the Court's jurisdiction over the beneficiaries. But there was a plea going to what was called the 'competency' of the action as against the trustees, which plea was maintained on the strength of a discharge which was set forth in the defences, but which, so far as it imported a complete discharge, was not admitted by the pursuers. The plea was, of course, repelled as a plea to competency. For an action is not incompetent, any more than it is irrelevant, merely because as it turns out it is open to a successful defence. But as regards the substance of the defence founded on the discharge, what happened was this—held that the admission of the discharge was insufficient, and accordingly allowed a general proof, and to this the Inner House adhered. But I appear to have added that, even if the discharge was admitted, the decree asked against the trustees might still be granted as a decree of constitution. And this, as I think, unfortunate observation, although not adopted, was not corrected in the Inner House. That is really the whole foundation for the pursuers' contention that the point now in question was decided in the case of *Falla*.

"It therefore appears to me that the defenders are right in their initial contention. Whatever may be the result of the action as against the beneficiaries, the trustees seem at least to be entitled to absolver.

"The next point is, whether, looking to the frame of the action, the pursuers could obtain any operative judgment against the beneficiaries. I confess I think it is extremely doubtful whether in any case they could do so. For the beneficiaries are only called for their interest—that is to say, to hear and see decree pronounced against the trustees. And *ex hypothesi* that decree is not pronounced, and even if pronounced, would be as against the beneficiaries a dead letter. Waiving, however, that difficulty, one thing at least seems certain—namely, that if the beneficiaries are to be held as competently called for their interest, they must at least be allowed to plead in this action all pleas which they

might properly plead in an action directed against themselves. And in that view the question arises whether, now that the facts have been ascertained, I can refuse to repeat, for what it may be worth, my previous finding that the pursuers' action is barred by *mora*—that is to say, by undue delay operating necessarily or presumably to the defenders' prejudice.

"Now, as to that, I have only to say that I think the proof has tended rather to emphasise than otherwise the considerations on which I previously proceeded. I see therefore no reason to change my former opinion, and I think it enough simply to say so.

"It remains, however, to consider the pursuers' case on what I have called its ultimate merits. We now know all that is to be known as to the two promissory-notes by Mr Bain's two sons. We also know all that is to be known about the reversionary interest in Mr Potter's estate, which is said to have vested in Mrs Bain, and through her, as the law then stood, in her husband. And the question to be considered is whether there has been made out as against Mr Bain a case of concealment—that is to say, intentional and fraudulent concealment such as is, I think, here required—with respect to either or both of these alleged assets of his estate. I think that is and must be the issue, for, whether necessary to the results or not, I have formed the opinion, following the views expressed by the Judges of the First Division in the case of the *Assets Company v. The Liquidators*, 10 R. 676, that upon the just construction of Mr Bain's declaration he did not warrant his statement of his affairs as true—otherwise than as true to the best of his knowledge and belief.

"Now, this being so, the result of the recent proof is, to the best of my judgment, this:—In the first place, the supposed discovery made after the action was raised that Mr Bain concealed an alleged vested reversionary interest in Mr Potter's estate, turns out, if I may so put it, to be a mere *nidus equinus*. The charge as a charge of fraud was difficult enough to begin with. It involved (1) the assumption that Mr Bain was so far an expert in the law of vesting and also in the law of husband and wife, that he realised in 1879 that he had rights under Mr Potter's settlement—rights the existence of which did not then or afterwards suggest themselves to the eminent solicitors whose business it was to wind up the succession. It involved (2) the further assumption that, because a reversionary interest arising on the expiry of life interests, and subject to other contingencies, attained in the events which happened a substantial value in 1888, it had therefore a substantial value in 1879. But (3) and lastly, it altogether overlooked the circumstance that, even as the law stood in 1879, estate coming to a wife does not pass absolutely to her husband, but did so subject always to the provisions of the Conjugal Rights Act of 1861. Mr Brown's and Mr Warden's evidence places this matter in the clearest light, and no im-

peachment of their figures was attempted; and yet, unless they are hopelessly wrong, the result is that so far from Mr Bain or Mr Bain's creditors having in 1879 any substantial or realisable interest in Mr Potter's estate, the interest, if it existed at all (which involves a point in the law of vesting which I have not considered), was, after satisfying the provisions of the Act of 1861, really a *minus* quantity.

"The whole question therefore comes to depend upon the alleged concealment of the two promissory-notes. Now, I think the promissory-notes ought to have been disclosed. They were, I think, assets of Mr Bain's estate. They were no doubt assets of a very special character—assets of which creditors, or even liquidators, might well be disposed to take no account. They were, perhaps, also assets which might naturally enough be omitted from Mr Bain's statement and declaration, and reserved as a subject of explanation and personal conference with the liquidators. I say so, because I entirely accept the evidence of Messrs Bain, who were most careful and candid witnesses. I quite believe what they said, viz., that they at least always understood that, although vouched by promissory-notes, the advances in question were not loans or intended as loans, but were simply advances to account of patrimony. Indeed, I think it highly probable that such truly was Mr Bain's intention. But still the contents of the two promissory-notes were, I think, assets of his estate. One of the two—that representing the advance to James—was probably quite recoverable; and while I quite accept all that was said as to the true intentions of parties, the fact remains that neither of the sons could say that their father to their recollection ever said anything to them, or committed himself by act or word so as to bar his legal rights in the premises. Moreover, James certainly paid interest, and when asked (although very apologetically) to do so, in 1879 repaid £200 of principal to enable his father to settle with the liquidators. I am not therefore prepared to affirm that at all events James Bain's advance was, or would have been, otherwise than an asset in bankruptcy if his father had been sequestered.

"But all this being conceded, the pursuers were not much benefited, for the question remains whether they have proved so as to enable the Court to affirm as a thing beyond reasonable doubt that as regards these promissory-notes Mr Bain did in fact fail to inform the liquidators of the true position. And my conclusion upon the evidence is that the pursuers have not so proved. I am not satisfied that Mr Bain failed to disclose the facts, such as they were, to the liquidators. There is certainly no presumption to begin with that he so failed. The presumption at least to begin with is that everything was done regularly and in order, and that the transaction was an honest transaction. It is not, I hope, lightly to be assumed that a man of Mr Bain's position and character should have been guilty of deliberate fraud. Nor is it quite intelligible

why, if guilty, he should have preserved the documents which were the evidence of his fraud, and placed them inside of his will to be published, as they in fact were in his inventory at his death. All this is at least somewhat difficult. And how do the pursuers propose to discharge the onus of proof which thus rests upon them? As I understand it, their case rests entirely on inferences sought to be drawn from the absence, in two documents which are still extant, of any mention of these promissory-notes or the transactions which they represent. The two documents are (1) Mr Bain's formal statement and declaration, and (2) a certain memorandum produced by Mr Haldane containing some jottings with reference to Mr Bain's case.

"Now, no doubt if it had appeared that the whole communications between Mr Bain and the liquidators were in writing, and also that all the writings which passed between them were still extant—if it appeared, for instance, that the declaration was the sole basis of the discharge, and that with respect to it no other writings passed, and no meetings took place between Mr Bain and the liquidators—I say if all that had appeared, inferences might in such circumstances have been drawn which would have been at least formidable. Perhaps, also, the result might have been the same if Mr Haldane (who is alive and was examined) had been able to say that he had a distinct recollection of what passed, and that he never heard of the promissory-notes, and must in ordinary course have done so, and would, if he had done so, have noted the fact in his memorandum. In point of fact, however, as to all this, the exact contrary is the fact. The communications between Mr Bain and the liquidators were not all in writing. There was at least one meeting after the date of the declaration between Mr Bain and Mr Jamieson, and there may have been several. It cannot, moreover, be affirmed that no writings passed, or that what writings did pass are all extant. Mr Bain's private papers, including those connected with his discharge, were destroyed after his death. Neither can it be said that the discharge proceeded simply on the basis of Mr Bain's declaration. In point of fact, the liquidator claimed that he should add to the statement of his assets a sum of £400, which he had drawn in anticipation of the bank's stoppage, and used in paying private accounts. And after at least one meeting with Mr Jamieson, Mr Bain (it does not appear why) conceded this point, and proceeded to raise the money, partly, as I have said, by obtaining back from his eldest son £200 of the £500 advanced to him. Then as to Mr Haldane,—he was examined for the pursuers, and rather pressed by their counsel; but he emphatically stated that he had no recollection one way or the other as to whether he knew of the advances in question, or whether Mr Jamieson knew, or whether they were or were not the subject of consideration by him or by Mr Jamieson. He thought it quite possible that he

might have heard of them, and he absolutely declined to say that his "Memo" of jottings enabled him to draw any inferences one way or the other. His jottings, he explained, merely related to matters with which he personally dealt, and so far as Mr Bain's case was concerned they related only to the matter of the £400—a matter which he referred to Mr Jamieson. Altogether it did not seem to me that the pursuers took much benefit by Mr Haldane's evidence, or by the evidence of Mr More, who was held as concurring. And therefore the case of the pursuers comes back just to this—that it rests entirely on Mr Bain's declaration, and depends really on this proposition,—that the fact of the promissory-notes, or the advances which they represent, not being mentioned in the declaration, that circumstance is *per se* conclusive of non-disclosure, or if not conclusive, is at least sufficient to throw the whole burden of proof on the other side. Now, it appears to me that, having in view the circumstances as I have endeavoured to state them, that is not a proposition which I can affirm. I am not satisfied, and cannot affirm, that Mr Bain concealed anything which the liquidators were entitled to know. I think that as the evidence stands the presumption is rather the other way. If I were put to it, I should be disposed to say that I think, all things considered, the probability is that there was disclosure, and that Mr Jamieson at least was told everything. But in any case I do not think that Mr Bain's declaration proves the pursuers' case. Nor do I think it is, in the circumstances, sufficient even to shift the onus of proof. I am, therefore, on the whole matter, of opinion that my judgment must be for the defenders, and that they are entitled to *absolvitor*."

The pursuers reclaimed.

After hearing counsel on the reclaiming-note, the Second Division directed that the cause should be argued before Seven Judges.

Thereafter the defenders moved for leave to amend the record by adding a plea of no title to sue. The Court refused the motion in respect that that plea involved a question which had not been remitted to Seven Judges.

At the hearing before the Judges of the Second Division, with the Lord President, Lord Adam, and Lord Kinnear, argued for the reclaimers—Bain's discharge was conditional on the truth, accuracy, and completeness of the statement of his affairs; the promissory-notes granted by his sons and his wife's rights in Potter's estate having been omitted from that statement, the discharge fell to be reduced, and that even if the omission was innocent. The terms of Bain's declaration imported a warranty of fact—*Standard Life Assurance Company v. Weems*, August 1, 1884, 11 R. (H.L.) 48, 21 S.L.R. 791. As appeared from the terms of the second question which Bain was required to answer, the words "to the best of your knowledge and belief" referred not to the list of his assets but only to their value. The case of

*Liquidators of City of Glasgow Bank v. Assets Company*, February 27, 1883, 10 R. 676, 20 S.L.R. 438, did not decide that fraud was necessary to the success of such an action as the present, but if necessary the evidence was sufficient to establish fraudulent concealment on Bain's part at least with regard to the promissory-notes. If these promissory-notes represented advances of patrimony as was alleged, that was no excuse for not disclosing them—*Webster v. Rettie*, June 4, 1859, 21 D. 915. The actings of Bain, of his sons, and of his executors with regard to the sums covered by these notes was inconsistent with their having been advances of patrimony; no document of debt was appropriate to such an advance, which was a gift, subject only to collation in a question with others having rights in succession. It could not be supposed that Bain did not know that promissory-notes were documents of debt, nor that he forgot about them, as he was receiving half-yearly interest on one of them. The suggestion that these notes had been disclosed verbally, though not in the statement of affairs, was inconsistent with the idea that Bain did not regard them as assets, and it involved an imputation of gross breach of duty on the part of the liquidators, in withholding material facts from the Court in their application for approval of the compromise. On that ground alone the interlocutor sought to be reduced would be set aside even if the promissory-notes were disclosed to the liquidators—*Henderson & Company v. Stewart*, December 7, 1894, 22 R. 154, 32 S.L.R. 120. With regard to Potter's estate, if a correct actuarial valuation had been made at the date of Bain's discharge, the present value of Mrs Bain's expectancy would have been ascertained and Bain's right thereto *jure mariti* should have been included in his statement; its omission was a breach of his warranty of fact. It was just such assets in the hands of the liquidators which were valueless for immediate realisation that were acquired by the pursuers. On the question of *mora* the case was ruled by *Assets Company v. Shirres*, January 28, 1897, 24 R. 418, 34 S.L.R. 353; *Assets Company v. Falla's Trustees*, December 11, 1894, 22 R. 178, 32 S.L.R. 143; *Assets Company v. Tosh*, 6 S.L.T. 124. The circumstances of the present case did not differ materially from those cases in which the plea of *mora* was repelled. Mere lapse of time did not support the plea—*Moncrieff v. Waugh*, January 11, 1859, 21 D. 216; *Cunninghame v. Boswell*, May 29, 1868, 6 Macph. 890, 5 S.L.R. 559; Ersk. iii, 7, 29, note (a); *C B v. A B*, March 5, 1885, 12 R. (H.L.) 36, 22 S.L.R. 461. The onus was on the party pleading *mora* to prove prejudice by reason of delay—*Cook v. North British Railway Company*, March 1, 1872, 10 Macph. 513, 9 S.L.R. 315; *Johnston's Executrices v. Johnston*, March 3, 1897, 24 R. 611, 34 S.L.R. 466. The defenders had not proved any prejudice. Knowledge was essential on the part of the party against whom the plea was maintained—*Seath v.*

*Taylor*, January 21, 1848, 10 D. 377; *Hill v. Wood*, January 30, 1863, 1 Macph. 360. Fraud was sufficiently established to impose on the defenders the onus of proving when knowledge was acquired by the pursuers, in order to show that they knowingly forebore to assert their rights—*Lindsay Petroleum Company v. Hurd* [1874], L.R., 5 P.C. App. 221. There had been no delay in raising the present action after the facts came to the knowledge of the pursuers. It was said the facts could have been ascertained from the inventory of Bain's estate in 1882. There was no duty to investigate; if the liquidators were bound to satisfy themselves of the truth and accuracy of Bain's statement, then the condition on which they granted his discharge was unnecessary; they were entitled to rely on his declaration without suspicion of fraud—*Betjemann v. Betjemann* (1895), 2 Ch. 474. There was no proof of such change of circumstances as had been held sufficient to exclude an action—*Liquidators of City of Glasgow Bank v. Mackinnon*, December 23, 1881, 9 R. 535, 19 S.L.R. 278; *Buckner v. Jopp's Trustees*, July 16, 1887, 14 R. 1006, 24 S.L.R. 680. The form of the action against discharged trustees was correct for the purpose of a decree of constitution—*Assets Company v. Falla's Trustees, cit. sup.*; *Forrest v. Forrest*, May 26, 1863, 1 Macph. 806. Defences had been lodged as though the trust was subsisting; if the whole estate was paid away the trustees should have allowed decree to pass in absence. Potter's trustees could not plead the discharge of Bain's trustees by beneficiaries in reply to a demand for payment by Bain's trustees. Trustees could not be finally and completely discharged without the authority of the Court. Decree of reduction against the trustees was a necessary preliminary to recovery of funds from Bain's beneficiaries who were *lucrati* by reason of his having avoided his liabilities as a contributory of the bank. The pursuers were seeking the nearest approach to *restitutio in integrum* in seeking to restore Bain's position as an undischarged contributory.

Argued for the respondents—Bain's discharge was not conditional on the absolute truth of his declaration, but only on the truth to the best of his knowledge and belief, as appeared from the terms of the declaration, the questions and answers, and the discharge—*Life Association of Scotland v. Foster*, January 31, 1873, 11 Macph. 351, 10 S.L.R. 215; *Standard Life Assurance Company v. Weems, cit. sup.* No part of Bain's estate was omitted from his statement; neither he nor anyone else was aware of any right vested in him under Potter's settlement, and the promissory-notes referred to had been proved to represent payments made to his sons when starting in life in circumstances which left no room for doubt as to Bain's intention that they should be treated as advances to patrimony; the payments of interest were consistent with that intention; they were necessary for the preservation of equality among his children. If Mr Bain had in-

tended to cheat the liquidators, he would not have preserved the promissory-notes. His letter of 10th November 1882 could not have been written if he regarded them as documents of debt, and that letter was written at a time when he had no purpose to serve in misrepresenting his position as the holder of these notes. If it had ever entered his head that they represented assets, he would certainly have spoken to his sons about them, but there had been no discussion on the matter between them. The pursuers had not proved fraud, and that was essential to the success of their case—*Liquidators of the City of Glasgow Bank v. Assets Company, cit. sup.* Mr Jamieson was the only liquidator with whom Bain had had a meeting, and the loss of his evidence was very material, as £400 was obtained by a bargain come to at that meeting. If the pursuers had any right to challenge the discharge in question, abandonment of that right was to be presumed by reason of their delay in asserting it. Apart from that, there had been such loss of evidence and change of circumstances to the defenders' prejudice as excluded the pursuers' right to insist in the action—*Lindsay Petroleum Company v. Hurd, cit. sup.*; *Robson v. Bywater, March 19, 1870, 8 Macph. 757, 7 S.L.R. 411*; *Cook v. North British Railway Company, cit. sup.*; *Liquidators of the City of Glasgow Bank v. Mackinnon, cit. sup.*; *Buckner v. Jopp's Trustees, cit. sup.*; *Johnston's Executors v. Johnston, cit. sup.*; *Stewart v. North, January 19, 1893, 20 R. 260, 30 S.L.R. 235*; *Seath v. Taylor, cit. sup.* None of the cases relied on by the pursuers supported their contentions. Wherever scantiness of evidence or imperfect recollection left any doubt everything was to be presumed in favour of the defenders. The action was incompetent and should be dismissed, there being no conclusion against any defenders except the trustees, who no longer represented Bain's estate, and could not ingather outstanding estate. No action lay against discharged trustees who had *bona fide* paid away the trust-estate; it was only against Mr Bain's beneficiaries that the pursuers could constitute their claim if they had one—*Balfour's Prac.*, p. 221, *Anent Executouris*, ch. xi; *Bankton*, iii, viii, 91; *Stair*, iii, 8, 70, et iv, 40, 33; *Stewart's Trustees v. Evans*, June 9, 1871, 9 Macph. 810, 8 S.L.R. 549. The case of *Falla's Trustees, cit. sup.*, did not decide anything to the contrary. In the case of *Forrest v. Forrest, cit. sup.*, the next-of-kin were called. Trustees were completely divested when discharged by the beneficiaries under their trust, and after their divestiture a creditor's only remedy was against the beneficiaries—*Wyllie v. Black's Trustee*, December 13, 1853, 16 D. 180. If the pursuers were creditors of Bain's estate they had mistaken their remedy; after constituting their debt against his beneficiaries they might use arrestments in the hands of Potter's trustees, who held funds to which Bain's beneficiaries were entitled.

At advising—

LORD PRESIDENT—The pursuers in this action, which was raised in June 1901, conclude for reduction (1) of an interlocutor of the First Division of the Court dated 18th March 1879, by which that Division sanctioned the liquidators of the City of Glasgow Bank carrying out, *inter alia*, an arrangement for compromise with Mr William Bain, a contributory who was unable to pay in full a call made upon him, and for discharging him of all his obligations to the bank or to the liquidators; (2) of an agreement and discharge entered into between Mr Bain of the first part, and the liquidators of the second part, dated 30th April 1879; and (3) for payment of upwards of £63,000.

Besides joining issue with the pursuers on the merits, the defenders maintained before us in argument three preliminary objections to the action—(1) that the pursuers have no title to sue; (2) that the action is not effectually directed against the testamentary trustees of Mr Bain, the contributory, who died in November 1882, because they have (the defenders allege) executed their trust, parted with the trust estate in a due course of administration, and been discharged by the beneficiaries, without having received any notice of the claim now made; and (3) *mora*.

The plea of 'no title to sue' is not stated on the record in this case, and the objection to title to sue was somewhat faintly maintained in argument. I may, however, say that I consider that there is no substance in it, as the pursuers are duly vested with the right to all the assets of the bank and of the liquidators, and consequently with all rights of action necessary for recovering any of these assets which may not as yet have been got in. It further appears to me that the question is concluded, in so far as this Court is concerned, by the decisions which have been pronounced in a number of previous actions of the same character instituted by the present pursuers—*Assets Company, Limited v. Shirres' Trustees*, 24 R. 418, and other cases.

With reference to the second objection, it is to be observed that the pursuers do not ask any decree for payment against the testamentary trustees of Mr Bain personally, but merely desire to have the sum sued for constituted as a valid debt against his testamentary trust-estate. Where the representatives of a deceased person have taken no steps to have themselves confirmed, or where they have renounced the succession, the pursuer of an action against them may restrict his claim to a decree *cognitionis causa tantum*, which gives him a right to attach the estate of the deceased person, but imposes no personal obligation or liability upon the defenders—*vide Forrest v. Forrest*, 1 Macph. 806. In that case the pursuer restricted his demand to a decree *cognitionis causa tantum*, and obtained decree in terms of the conclusions of the summons as so restricted. I think it may be correctly stated as a general proposition that a person is entitled to bring an action of constitution against the representatives of his debtor for the purpose of

establishing the liability of his (the debtor's) executry estate for a money claim even if he (the pursuer) may be unable to obtain a decree for payment against these representatives. The fact of a testamentary trustee having resigned or executed the trust does not, in my judgment, deprive a creditor of this right, although other remedies, such as confirmation as executor creditor, may possibly be open to him. It is to be kept in view that both the defenders, the testamentary trustees of Mr Bain, and Mr William Bain junior as an individual, appeared and lodged defences in the present action, but neither the trustees nor Mr William Bain junior pleaded that the action is incompetent as directed against them respectively.

The defenders suggest that the proper course for the pursuers was to sue the beneficiaries of Mr Bain directly, and it may be that they could follow the funds (if they are extant) into the hands of any gratuitous taker, but these beneficiaries would doubtless have pleaded that they knew nothing as to the facts alleged by the pursuers, and that having received the funds *in bona fide* from the persons authorised to administer them, they were not liable in accounting and payment. The most obvious and natural course seems to me to be the one which has been followed of proceeding against the testamentary representatives of Mr Bain, into whose hands the funds *ex hypothesi* came, and who are the proper persons to account for their disposal. In this connection I may refer to the case of the present *Pursuers v. Falla's Trustees*, 22 R. 178, in which it was held (affirming the judgment of Lord Kyllachy) that it is competent to sue a trustee who has distributed the whole trust estate and been discharged by the beneficiaries for the purpose of constituting a claim against the trust estate. The beneficiaries can effectually discharge or affect their own rights which have come to them by the bounty of the testator, but they cannot, in my judgment, discharge or affect the rights of creditors of the testator who claim not under but against his trust.

For these reasons I consider that the second plea of a preliminary character advanced by the defenders should not be sustained.

The third plea urged by the defenders against entertaining the action was that it is excluded by *mora*. It appears to me, however, that the plea of *mora* cannot be successfully maintained merely on account of the lapse of time, but that the person stating it must also be able to show that his position has been materially altered, or that he has been materially prejudiced, by the delay alleged. In other words, mere lapse of time will not, in my judgment, found an effective plea of *mora*. The law of Scotland provides for cases in which it is considered that lapse of time alone should form a sufficient answer to a claim or lead to the mode of its proof being restricted in the various prescriptions and limitations—the triennial, the quinquennial, the sexennial, the septennial, the vicennial,

and the long prescription of forty years. It is not maintained that the present case falls under any prescription or limitation known in the law of Scotland, and I think that we should be slow to add, by decision, a plea of bar or discharge resulting from mere lapse of time which the Legislature has not thought fit to sanction by statute. At the same time I do not doubt that where, coupled with lapse of time, there have been actings or conduct fitted to mislead or to alter the position of the other party to the worse, the plea of *mora* may be sustained. But in order to lead to such a plea receiving effect, there must, in my judgment, have been excessive or unreasonable delay in asserting a known right, coupled with a material alteration of circumstances, to the detriment of the other party—*C B v. A B*, 12 R. (H.L.) 36, *per* the Lord Chancellor (Lord Selborne), p. 40, and *Mackenzie v. Catton's Trustees*, 5 R. 313, in which Lord Deas, p. 317, said—“*Mora* is not a good *nomen juris*. There must either be prescription or not. We are not to rear up new kinds of prescription under different names”; and accordingly the usual and proper mode of stating the plea is that the action is barred by *mora*, taciturnity, and acquiescence, and the facts upon which the plea so expressed is founded are set out on the record. I do not find anything in the facts alleged or proved in the present case which should, in my judgment, lead to the plea, thus properly expressed, being sustained. I may add that the plea of *mora* has been repeatedly stated in actions at the instance of the present pursuers against contributories of the bank or their representatives in a position similar to that of the defenders in this case, but always, so far as I know, without success. Thus in the case of the present *Pursuers v. Falla's Trustees*, 22 R. 178 (already referred to), the plea of *mora* was stated unsuccessfully fifteen years after the discharge and ten years after the death of the declarant; in an action at the instance of the present *Pursuers v. Shirres' Trustees*, 24 R. 418 (also already referred to), seventeen years after the discharge and one year after the death of the declarant; and in an action at the instance of the present *Pursuers v. Tosh*, 6 S.L.T. No. 124, nineteen years after the discharge and twenty-one years after the declaration.

For these reasons I am of opinion that all the pleas stated by the defenders in bar of a consideration of the case on its merits should be repelled.

The question on the merits is whether grounds have been established for reducing and setting aside the arrangement which was made by the liquidators of the bank with Mr Bain and the discharge which was granted by them to him, and in considering this question it is necessary to advert carefully to what was actually done by the parties and to the terms, printed or written, of the agreements entered into between them, and especially of the conditions subject to which the discharge was expressly granted.

The bank stopped payment on 2nd October

1878; it went into voluntary liquidation on the 22nd of that month, and the liquidation was on 27th November 1878 placed under the supervision of the Court. On 18th November 1878 the liquidators resolved (*First*) that all persons who were not prepared to make payment in full of the call of £500 per share then made, or to satisfy them that it would be paid without undue delay, should be required to return answers to the queries contained in a schedule, and to attest them by a solemn declaration attached; and they also resolved (*Second*) "that any discharge to be granted shall proceed on the truth of the declaration emitted by the applicant, any untrue statement made therein being held to invalidate the discharge."

When the bank went into liquidation on 22nd October 1878, Mr Bain was proprietor of £1200 of the capital stock of it, and in respect of the calls made upon him in respect of that stock he became liable to the liquidators for £33,000, to account of which he paid £2743, 6s. 6d. He represented to the liquidators that he was unable to pay the first call in full, and on 8th January 1879 he emitted a solemn declaration before a justice of the peace in which he declared that his whole property and estate were truly and correctly disclosed in the answers which form part of the declaration. In reliance on the answers and relative declaration, and believing them to be in accordance with the facts, and also believing that Mr Bain had made a complete disclosure and surrender of his estates, the liquidators on 13th March 1879 presented a note to the First Division of the Court, in which they sought its sanction to their carrying out, *inter alia*, a compromise with him in respect of the payments which he had made, amounting in all to £2743, 6s. 6d., and discharging him of his liabilities to the bank and the liquidators. In the note and relative list and memorandum it was represented that Mr Bain had made a complete surrender of all the property which he possessed, and the discharge proceeded upon the basis and, as I think, upon the condition of this representation being in accordance with the facts.

To the second printed question appended to the minute of the liquidators, dated 18th November 1878, above mentioned—"What property do you possess, and what is its nature and value to the best of your knowledge and belief? (Specify the particulars, if necessary, in the separate signed list or schedule marked A, and accompany the statement with valuations, certified rentals, and other evidence of value by competent parties)," Mr Bain made the following written answer—"No property. Certificates of stock held. See Schedule A." To the third question put—"Have you since 1st October 1878, either in implement of your obligations or otherwise, sold, gifted, or conveyed away in trust or otherwise, or placed under the charge or in the custody of any person or persons, or in any way put away, set aside, or concealed, any property, money, bank or railway stock,

shares, or effects of any kind? If so, state the particulars and value and present position of such property so alienated. Or have you, since 1st October 1878, renounced or discharged or given up any right of any kind which you then had? If so, state the particulars thereof." Mr Bain answered in writing, "No." The sixth question was—"Have you any expectation of funds or property of any kind coming to you by succession or otherwise? If so, state its nature and probable value," and to this Mr Bain replied in writing, "None."

In answer to the ninth question,—“What sum or other consideration do you offer for a discharge in full of all claims by the liquidators against you as a shareholder in the City of Glasgow Bank, and in what manner do you propose it shall be secured or paid? or in view of continuing liable as a partner, what sum do you offer to pay to account; and in what manner and at what terms do you propose that it shall be secured or paid?” Mr Bain wrote—"To hand over the certificates of stock held, my life policy, valuation of furniture, and the cash in my possession, and a cheque for the balance at my credit in the City of Glasgow Bank, amount, £235;" and in Schedule A he stated that he held 175 shares of the Standard Investment Company, and 50 shares of the Imperial Credit Company, Limited, adding the selling prices of these shares at 5th November 1878, which amounted together to £742, 10s. Appended there was a statement of Mr Bain's effects at 5th November 1878, the total amount being £2455, 13s.

On 8th January 1879 Mr Bain made and signed in presence of a justice of the peace a declaration appended to the answers and statements just mentioned, in which he solemnly and sincerely declared that the several matters and things mentioned and contained in the answers above mentioned, and which were signed by him as relative thereto, were true and correct answers to the printed queries prefixed thereto to the best of his knowledge and belief, and that he made the declaration conscientiously believing it to be true.

The liquidation having been placed under the supervision of the Court as above mentioned, the liquidators, on 13th March 1879, presented to the Court a list of the contributories who had applied for a discharge of their obligations for the debts of the bank on making a complete surrender of their estates to the liquidators, and the name of Mr Bain was, I understand, with his authority included in that list.

An agreement between the liquidators and Mr Bain was entered into, and a discharge was granted by them to him on 30th April 1879. This deed bears, *inter alia*, that the liquidators agreed to grant the discharge "on the basis and on the condition of the truth, accuracy, and completeness" of the statement of his affairs, means, and property which Mr Bain had delivered to them, verified by the solemn declaration above mentioned. The whole arrangement between the liquidators and Mr Bain proceeded upon the basis and the



condition of his statements being "true" (a word which in its ordinary signification means "in accordance with the facts"), "accurate, and complete," and I am disposed to think that the truth (in the sense just stated) as well as the accuracy and completeness of the statements were conditions of the discharge which he obtained being effectual. But even if the condition was held to require only that the statement should be true in the sense of being in accordance with the knowledge and belief of Mr Bain, though it was not in accordance with the facts, I do not think that this minor requirement was satisfied in the present case.

After the death of Mr Bain it was ascertained from his testament testamentary that on 1st January 1874 his son Mr James Bain had granted to him a promissory-note for £500 payable on demand, of which sum of £500 £300 still remained due at his death, and that on 23rd May 1877 his son the defender Mr William Bain junior had granted to him a promissory-note for £200, which also remained unpaid at his death. Although Mr Bain held both of these promissory-notes when he made the declarations already mentioned, he did not inform the liquidators, either in the answers which he made to the printed questions or otherwise, of the existence of either of these notes, the sums remaining due under which were in fact and were properly treated by his executors as being assets belonging to him at his death as they had belonged to him during his life, from the dates on which they were respectively granted.

It is stated by the defenders in explanation of the existence of these promissory-notes not having been mentioned in Mr Bain's signed declarations relative to his estate, or otherwise communicated to the liquidators, that the notes were not intended to constitute debts by his two sons to him, but that they were truly anticipated payments to account of the shares of his means and estate to which they would become entitled at his death. I understand that the £500 was advanced to Mr James Bain for the purpose of enabling him to go into a mercantile business in London (Andrew Lusk & Company), and it appears that when Mr Bain required money he demanded and received from his son James payment of £200 of the £500 due under the promissory-note granted by him, and he (Mr Bain) seems to have, generally at least, demanded and received interest on the £500 contained in the promissory-note for that amount, or upon the amount which remained due under it after the £200 above mentioned had been paid. The statement by the defender Mr William Bain junior in regard to the promissory-note for £200 is that he granted it to his father in acknowledgment of £200 which his father advanced to him to enable him to furnish his house when he was appointed agent for the bank at Lasswade. Whatever may have been intended I am unable to accept these statements as affording any justification of the non-disclosure of the existence of the promissory-notes by Mr

Bain to the liquidators. They were undoubtedly documents of debt upon which he could at any time have obtained decree against his sons for payment of the sums due under them respectively, or in other words, these sums were clearly assets of his estate. I understand that he continued to demand and receive interest on the sums due under the promissory-note first mentioned down to his death in 1882, and that the amount which remained due under that promissory-note was paid by Mr James Bain to his father's executors in January 1883. Mr William Bain also paid to his father's executors the sum of £200 due under the promissory-note granted by him to his father, and he also paid interest on that sum from the date of his father's death though not previously. It was stated in the argument before us, and was not I understood disputed, that the amount, principal and interest, due to Mr Bain by his sons Mr James Bain and Mr William Bain junior under the promissory-notes just mentioned, on 8th January 1879, when he signed the declaration above referred to, was £718, 15s. 7d. or thereby. Under these circumstances I am of opinion that the disclosure of his property made by Mr Bain to the liquidators, which made no mention of either of the promissory-notes, was not true, accurate, and complete, either (1) in fact, or (2) according to Mr Bain's knowledge, and that therefore an essential condition of the agreement entered into between the liquidators and him, upon which the discharge proceeded and upon which its validity depended, was not fulfilled.

It was further maintained by the pursuers that when the discharge was granted to Mr Bain in reliance upon and subject to the condition of the truth, accuracy, and completeness of the disclosure made by him of his property and estate, he had right to moveable estate of the value of £7000 or more, which had come to his wife from her father Mr Potter, and had vested in Mr Bain *jure mariti* prior to 1881. Although it appears that Mrs Bain had a vested right in part of the estate of Mr Potter, her father, and that this right had passed to Mr Bain *jure mariti* at the time when he made the declaration above mentioned, it is not proved that he was then aware that he had any such right. The question on this part of the case therefore comes to be, whether, in order to the discharge granted by the liquidators to Mr Bain being avoided by the non-disclosure of a right, Mr Bain must, at the time when he made the declaration, have known of its existence, or whether he, in effect, warranted the conformity of the statements made by him to the facts, and agreed that, whether he knew, or did not know, of the existence of a right which he had, the fact of his having had it and not disclosed it should lead to the avoidance of the discharge. This is an important question, and I am disposed to think that Mr Bain in effect warranted that his statements were in accordance with the facts, not merely with his knowledge or belief as to the facts, and

that consequently the circumstance of the property in question not having been disclosed would avoid the discharge. If, however, I am right in the views which I have expressed as to the two promissory-notes, it is not necessary to express a definite opinion as to the effect of the non-disclosure of the estate which came to Mrs Bain from her father Mr Potter, and passed to Mr Bain *jure mariti*, although for the purposes of the present question I assume (as the fact seems to be) that he was not aware that he had any right in or to that estate.

The important question then comes to be, whether, under the whole circumstances stated, the discharge granted by the liquidators to Mr Bain can stand, and I am of opinion that it cannot. The discharge was not, in my judgment, an absolute, but only a conditional one, and if I am right in the views above expressed, the conditions upon which its validity depended were not fulfilled.

It was maintained by the defenders that the existence of the promissory-note in question may have been revealed to the liquidators, or one of them, verbally, but it does not appear to me that so improbable a suggestion can, without any evidence to sustain it, be accepted as a satisfactory answer to the claim of the pursuers. It is well known to the Court that the liquidation was conducted with great ability and in a most business-like manner, and I am unable to accept the suggestion, not sustained by any proof, and contrary in my judgment to all experience and probability, that the liquidators gratuitously discharged their claims for the sums of £300 and £200, and interest remaining due, under the two promissory-notes, against Mr Bain, without even making any record, note, or memorandum on the subject, and without bringing the matter before the Court, as it was their custom to do in cases attended with any doubt, or proper for being dealt with by way of compromise, and asking its authority to make the settlements which they proposed.

In aid of their plea of *mora* the defenders suggested that important evidence might have been lost by the delay in making the present claim—for example, that if the late Mr George Auldjo Jamieson, one of the liquidators, who had had a meeting with Mr Bain, had been still alive, he might have been able to prove that he had verbally acquitted or discharged the claim without further consideration than that actually given, but it appears to me that this suggestion cannot be accepted. Mr Haldane, the liquidator, who chiefly at least dealt with Mr Bain, has no recollection of his (Mr Bain's) having disclosed the assets in question, and if any disclosure of them had been made, it is difficult to believe that Mr Haldane would not at least have noted it and brought it up for consideration or instructions by the Court. I may add that the effect of the arrangement made between the liquidators and Mr Bain, by the minute and answers and declaration already mentioned, was for a disclosure in writing, and it is therefore, as well as in view of the

importance of the matter, to be assumed, in the absence of any evidence to the contrary, that if a disclosure had been made, it would have been in writing, or at all events that a written note or record of it would have been made and preserved.

For these reasons I am of opinion that the conditions of the agreement entered into by the liquidators with Mr Bain were not fulfilled, inasmuch as his statements to them were not true, accurate, or complete in what appears to me to be the sense of the agreement, and that therefore by the terms of the agreement itself it is not binding upon the liquidators, and cannot be upheld as valid as against the pursuers, their successors in title.

The view now expressed has been arrived at upon what seems to me to be the true construction of the documents as applied to the proved facts, but it was maintained by the defenders that the pursuers are not entitled to prevail unless fraud on the part of Mr Bain is established, and they referred to certain *dicta* of very eminent Judges in support of this contention. In the case of *The Liquidators of the Bank v. The present Pursuers*, 10 R. 677, in which it was held that all documents disclosing the particulars of compromises and discharges made by the liquidators in dealing with the estates of insolvent contributories fell to be unreservedly given up to the present pursuers, the Lord President (Inglis) said that the discharge granted to a contributory is a conditional discharge—"it is a discharge which is conditional on the truth of the statement made by the contributory to the liquidators regarding his estate—that is to say, if any part of the statement is designedly false, and intentionally misrepresents the state of the contributory's affairs, then the whole discharge is bad;" and again, "I entertain a tolerably strong opinion that nothing short of fraud would induce the Court to set aside any of these discharges;" and Lord Deas said that he "agreed in thinking that something amounting to fraud must be alleged and proved before these discharges which have been granted to contributories of the bank can be set aside." These are *dicta* of very distinguished Judges, and they are entitled to much respect, but it is to be observed that they were *obiter* in the sense that they were not essential to the decision of the case, or the question under their consideration at the time, and it does not appear whether they were argued fully or at all. It is therefore, in my judgment, our duty, especially sitting as a Court of Seven Judges, to form an independent opinion upon the question whether fraud on the part of contributories who were settled with requires to be established for the purposes of this case. My opinion is that it does not.

For these reasons I am of opinion that the interlocutor of the Lord Ordinary should be recalled—that decree of reduction should be granted as concluded for.

LORD JUSTICE-CLERK — The opinion I have formed is to the same effect as that

given by your Lordship, and for the grounds of it I would refer to the opinion to be delivered by Lord Trayner.

LORD YOUNG—The Lord Ordinary, by his interlocutor of 22nd February 1902, assoilzied the defenders from the conclusions of the action, and on the reclaiming-note against that interlocutor I was, after hearing a full argument, of opinion that it ought to be affirmed. I concurred substantially in the opinion expressed by his Lordship in the note appended to his interlocutor, although I should not have sustained the defenders' second plea-in-law ("Mora" and "Taciturnity"), which I was and am still unable to regard as a plea-in-law. But although I was thus of opinion that the case might be, and ought to be, finally disposed of upon the record and the documents produced and then before the Court without allowing further evidence, yet, as my learned brethren were of opinion that it would in the interest of both parties be more satisfactory before answer to allow a proof at large, I abstained from expressing objection to this being done—other than might, and I thought would, be implied from the observations which I made when proof was allowed. These observations, and those of my learned brethren on the occasion, are printed.

After proof was taken the Lord Ordinary pronounced the interlocutor of 13th June 1903, whereby he repeats his previous judgments assoilzieing the defenders, pointing out in the first paragraph of his note that "the case is now in the position of a concluded cause." I have of course read and considered the note which is appended to this interlocutor (of June 1903), in which his Lordship expresses fully, and I think clearly, his view of the facts upon which the "concluded cause," as he properly calls it, must in his judgment be decided, and I may say at once that his view of the facts as they are presented by the record, productions, and parole evidence, is, in my opinion, accurate and sufficiently complete, which relieves me of the necessity of stating in detail the facts on which my judgment is based, although I may find it necessary to call special attention to some of them when stating my opinion of the legal results or conclusions.

The first question in the case seems to me to be—Have the pursuers any, and if so, what ground of action against the testamentary trustees of the late Mr Bain? and this question, which I regard as of much and very general importance, I now propose to consider.

The purpose of the action as stated and explained to us by the pursuers' counsel is to establish by judgment that the late Mr Bain was at his death on 30th November 1882 indebted to the pursuers in a sum of money which with interest added to the date of the action (June 1901) amounts to £63,787, 13s. 3d. Three individuals, viz.—William Bain, Edinburgh, James Bain, London (sons of the deceased William

Bain, the testator), and William Bain of Stoneywynd (a nephew of the testator), designed in the summons as "the accepting and surviving trustees nominated and appointed by William Bain,"—"by trust-disposition and settlement, dated 15th April 1875," are called as defenders and concluded against, not personally, but "as trustees foresaid."

It will conduce to brevity and clearness if I refer to the late Mr Bain (whom the pursuers allege to have been their debtor) as the testator, and to those called as being "the trustees nominated and appointed by his will" as the defenders, they being, as I agree with the Lord Ordinary in thinking, the only defenders in the case. The action against them was of course brought on the assumption that in 1901 they held office as the testamentary trustees of the testator, and that there was then upon them, as such, some theretofore unfulfilled duty, which the pursuers might by their action compel them to perform. We must, I think, take it as proved in fact and clear in law that in the course of the six years that elapsed between the death of the testator in 1882 and that of his widow in 1888 the defenders ingathered the whole estate which belonged to the testator at his death, so far as known to them, and administered it in all respects properly. The final act of administration was, of course, the payment of the residue of capital to the beneficiaries entitled thereto, the defenders receiving from them the discharge, dated in October and November 1888. The facts are not in dispute, and upon them we must hold that after six years' administration of the trust-estate, and satisfying every claim upon it of which they had notice or knowledge, resulting necessarily in the complete divestiture of themselves, the executry and administrative duties of the defenders—and they had no other—ended. A discharge by those entitled to the residue of a testamentary trust estate granted to the trustee (or trustees) after accounting is undoubtedly the usual, formal, and effectual termination of such a trust and liberation of the trustees.

During the sixteen years that have now elapsed since the divestiture and discharge of the defenders, the Assets Company alone have intimated to them any claim which could possibly have demanded their attention while undivested and undischarged, indeed any claim whatever. Their claim was first intimated to the defenders in 1901, and their (the Assets Company's) contention, if I understand it, is, that by such intimation and this action following upon it, the trust, which for thirteen years had been dead, as I think, or slumbering as they might prefer to call it, was revived or awakened, and the defenders restored to sleepless life as trustees destitute of estate, but with anxious and costly duties to be performed by them at their personal and individual expense for behoof of the pursuers, who unfortunately, whether excusably or not, were, as they say, so long of discovering that

they had any ground of claim against the testator or his estate that they could not take action sooner than they did.

I have endeavoured to realise the position of the Assets Company by reading and considering the provisions of the statute, in some respects remarkable, whereby they are constituted and invested with right. The practical question, however, is only this—Whether in this action at their instance, brought to constitute a debt which they allege to have been owing to them by the deceased Mr Bain, they can, with reference to any question legitimately arising therein, be regarded as in a more favourable or in any respect different position from any lawfully constituted mercantile company, or indeed any pursuers having *locus standi in judicio*? It is, as it seems to me, a mercantile company of a noticeably speculative character with shareholders in the same position with respect to liabilities, and risks of profit or loss, and liberty to put their shares on the market, as those of any mercantile company. It was started and its statutory constitution obtained, as we were informed (I have no doubt truly), by the larger and wealthier shareholders or contributories of the City of Glasgow Bank in liquidation, who were at an early stage able from their pecuniary resources to contribute funds which enabled the liquidators to pay off not quite but nearly the whole of the debts of the bank. I should assume, in the absence of any reason to doubt, that these wealthy shareholders were men of business with extensive experience, and that they started this Assets Company in expectation not of loss but of profit, an expectation which was certainly immediately and largely realised. This action is brought and maintained by the company only for the purpose of increasing its funds and the profits of its shareholders, and I can see no reason for regarding the company as in a different position with respect to any question arising in the case from that of any pursuer of an action brought to constitute and recover an averred debt.

The pursuers necessarily maintain that it was the duty of the defenders to consider, so as to form an intelligent opinion of its merits, their claim for £63,787, 13s. 3d., as specified in the action, of course taking professional and other aid reasonably needful, and to act accordingly by admitting or contesting it. If they had no such duty, the merits of the pursuers' claim cannot I should think be decided in this action against them as sole defenders. It was pointed out with frequent—I do not say too frequent—but certainly frequent repetition, that no money could be exacted from the defenders upon a decree under the petitory or pecuniary conclusion, and contended that having themselves no interest to resist the reductive conclusion, they might have allowed the pursuers to have decree upon it for what it might be worth. I cannot regard this as argument, or at any rate as worthy of consideration. No debt

of a testator is exigible from his testamentary trustee personally, unless upon a decree or order given against him personally as having by his conduct incurred such liability. But the validity of a claim of debt or damages advanced as due by a testator and payable out of the trust estate left by him may certainly be decided in an action against the trustee administering it, although, of course, only to the effect that he may, and indeed must, administer the estate accordingly, however other creditors or beneficiaries interested in it may thereby be affected. If, therefore, the Assets Company had intimated their claim to, and brought their action against the defenders while holding office and administering trust estate, it would have been their (the defenders') duty to consider the whole case, and, if they thought proper in the reasonable exercise of their judgment, to reject the claim and defend the action, of course at the expense of the estate, *i.e.*, paying their properly incurred costs out of it, unless, indeed, as what I have said perhaps sufficiently implies, the Court, judging of their conduct as trustees, deemed the claim so clearly and obviously good on indisputable facts and law, that to resist it and defend the action was inexcusable conduct on their part. It is too obvious to need to be pointed out that if the Assets Company's claim is good the testator died bankrupt, and that had it been intimated to the defenders while trustees in possession of trust estate, they could not, until it was conclusively decided that it was bad, or some settlement of it arranged, have paid away any part of the estate, even to the liferenting widow or to creditors, other at least than those for deathbed and funeral expenses.

The pursuers, as I understand, admit that any money claim which may be established, or, as they express it, "constituted," in their favour by reduction of the discharge granted to the testator, will not be exigible from the defenders, but only from those to whom the defenders paid away the trust estate. I have not heard, and am unable to conceive, any reason for thinking that in 1901 the defenders represented or were charged with the interests of all or any of these individual recipients (creditors, liferenter, or legatees), of payments made to them by the defenders.

I do not think it was maintained by the pursuers' counsel that the payments made by the defenders to the testator's creditors, or to his widow during her survivorship, can be recovered from the recipients, or any others, to satisfy the pursuers' claim howsoever constituted. The only fruit of victory in the reduction which they suggested as possible was a right to demand from the residuary legatees the legacy paid to each respectively, as specified in the discharge granted by them to the defenders. But if so, they are the only parties having interest to resist such victory, and there is no suggestion that they authorised the defenders, whom they had discharged of the only relation that ever existed between them, to act for them or represent

their interest in resisting the pursuers' claim.

We have no occasion to consider what liability a testamentary trustee may incur by undue haste in parting with the trust estate to the prejudice of an unpaid creditor. Undue haste is not imputed to the defenders. Had it been, the consequent liability would necessarily have been personal, and none such is alleged. Is there, then, any law, common or statutory, limiting the time within which a creditor of a testator may bring action against his testamentary trustee, who has without undue haste and in all respects properly divested himself of the trust estate? Creditors of a deceased debtor are by the common law required, in the manifest interest of others, to be *vigilantes non dormientes*, and I should say that if a trust estate was parted with before ordinarily vigilant creditors had fair and full time to give notice of their claims, it would be a case of undue haste by the trustee. The period allowed here was six years, being so long because of the survivance of the liferenting widow. I am unable to assent to the contention, of which I understand your Lordship in the chair to approve, that the question how long after his complete divestiture a trustee is liable to be sued for a debt of the truster of which before divestiture he had no knowledge or notice, is simply a question of prescription depending in each case upon whether or not the debt sued for was at the date of the action extinguished by the long prescription of forty years. I do not think it necessary to notice specially the shorter prescriptions, which are statutory and affect only modes of proof or questions of evidence. With respect to all prescriptions, short and long, statutory or common law, I am of opinion that they have no bearing whatever upon the question how long testamentary trustees ought in their own interest and that of others—creditors who have not discovered their ground of debt—to retain in their hands the residue of the trust estate which remains in their hands after satisfying all debts and claims of which they have knowledge or notice, and are offered a full discharge by those entitled to that residue. No trustees would willingly divest themselves of such residue so long as they were liable to be sued for debts payable therewith. How long is that? The answer according to this long prescription notion is—so long as an unprescribed debt of the testator may possibly exist, and that no other limitation can be recognised unless and until the Legislature shall see fit to sanction it by statute.

I recal some remarks made in the course of the debate indicative of wonder that the defenders, if they had any confidence in the defence with which I have been dealing, should also have stated and maintained a defence on the merits, viz., on the grounds of reduction. In my opinion they could not properly or in accord with the rules of pleading have avoided doing so—the only alternative being to allow the

pursuers to have decree against them in absence, or by default, which if allowed to stand unrecalled would have the same effect as a decree *in foro*. It may be inferred from what I have said that I do not doubt the defenders' confidence, probably on competent professional advice, in the soundness of their preliminary, as it has been called, defence. But neither can I doubt that experienced men of business would point out that sound in their opinion as that defence was there might in the result be a balance, however small, of judicial opinion against it. Further, I think it is due to the defenders to say that it would in my opinion have been unbecoming on their part to abstain, supposing, contrary to my opinion, that they could, from answering, and to the best of their information and power refuting the strong, indeed gross imputations and charges of falsehood and fraud made against the testator, who was the father of two of them and the uncle of the third. These charges they knew or honestly believed to be untrue, as the Lord Ordinary has after full inquiry pronounced them to be.

I have I trust distinctly enough expressed my opinion to the effect that it is sufficient for the defenders' preliminary defence that they properly without undue haste paid away the whole trust estate in excusable ignorance of any right of claim—real or supposed—of the Assets Company. The fact of the continuance of such ignorance for thirteen years thereafter, and the question whether or not that company or their agents were blameworthy (in what sense and to what extent) in the matter, are I think immaterial to this defence, however material they may be to the defence on the merits.

I have noticed the fact that two of the defenders are sons of the testator, and as such legatees by his will, although it did not and does not seem to me of importance, and so far as I remember was not in argument referred to as being so. A testamentary trustee who is related to the testator is frequently also a legatee, and the fact that he is so cannot affect his duty and responsibility and rights as a trustee according to the ordinary rules of law applicable to testamentary trusts.

I have already pointedly and perhaps too frequently noticed that the pursuers cannot, and admit that they cannot, by success in this action reap any fruits or take any benefit, except or beyond recovering from each of the five residuary legatees the sum paid to him or her by the defenders. I have I hope made it clear that I think we cannot in this action decide anything adverse or favourable to these legatees whereby they would either be saddled with or relieved of liability to the pursuers or others by whom they may be lawfully sued. But as the pursuers practically base their action upon the assumption of the suggested liability which I am noticing, telling us distinctly that their only purpose in raising and insisting in it is to enable them to enforce that liability,

it may be, and I incline to think is, legitimate to consider whether they have stated and proved facts (for we are disposing of a concluded cause) which support that assumption without which the action is admittedly purposeless. What, then, is the law applicable to the right of an unpaid creditor of a testator to demand from a legatee payment of his debt to the amount of the legacy paid to him by the testamentary trustees. I have stated the question generally, but in dealing with it will consider only the case of a legatee, payment of whose legacy was made to and received by him *in bona fide*, and in all respects properly in ordinary course, without undue haste or pressure. One way of putting the question is—What time, if any capable of specification, must elapse before such a legatee can regard as his own the cash received by him, and safely allow his expenditure or conduct to be influenced thereby? The recipient of a large pecuniary legacy may retire from the business by which he had been making his livelihood, and enter upon a different, perhaps leisurely and costly, mode of life; while the recipient of a small legacy may, and often does, pay it away to relatives or friends (of himself or of the testator) who may, as he generously thinks, have more need of it or be better deserving of it than himself, or to some public or private charity. Without any inquiry, here we have accidentally been furnished with information regarding the expenditure by each of the five legatees to the extent of about a third of his (or her) legacy, it being stated in the discharge that the defenders (the trustees), at their (the legatees') common request, paid to their mother during her survival, in addition to the whole income, £959, 19s. 1d. out of the capital of the trust estate. The true and legitimate view of this is that the defenders thus paid to the residuary legatees their legacies to the amount of £959, 19s. 1d., and at their request spent it for them by handing it to their mother—the amount paid to each at the final distribution in October 1888 being thereby necessarily reduced by one-fifth of that sum, being about one-third of his legacy. How the remaining two-thirds may have been spent by each we do not know, but may, it being now sixteen years since it was received, reasonably assume that it was properly spent, and probably as beneficently and becomingly and irrecoverably as the one-third given to their mother. It is, in my opinion, a clear and strong case of *bona fide* perception and consumption, and I concur with the Lord Ordinary in rejecting the contention that it is governed by the law of prescription, according to which, as the pursuers contend, no legatee can regard himself as the owner of his legacy, and spend it or conduct himself and his affairs on the footing that the money is his so long as it is possible that a creditor of the testator may turn up before his debt has been extinguished by the long prescription.

I proceed now to consider "the ultimate merits," to use the Lord Ordinary's language, of the pursuers' case on the assump-

tion that the trustees' plea to which I have been referring is to be repelled, and here the first question seems to me to be—Whether or not the statutory agreement between the pursuers and the liquidators of the bank imports their investment with a right to challenge the decree of this Court and the discharge of the late Mr Bain referred to on record? "Statutory agreement" is, I think, the appropriate expression, the agreement between the liquidators and the Assets Company being not only referred to in the Act of 1882 but made part of it. It is clear, therefore, that the question whether or not the alleged right was thereby conferred on the pursuers must be determined upon a judicial construction of the whole of that statute, so far as legitimately bearing upon it.

My first observation is that the agreement was in its character a contract of sale between the Assets Company and the liquidators of the bank, whereby the former purchased and the latter sold the assets of the bank in liquidation for an agreed-on money price, the money when paid being of course used by the liquidators in the discharge of their duty as such. The subjects sold and the agreed-on price are specified in section 1 of the agreement. It is admitted that the Assets Company paid to the liquidators the agreed-on price, and thereupon received a discharge in the form given in the third schedule of the Act, and that the liquidators paid and obtained discharges of the whole debts of the bank, so far as known to them, down to the eve of their own discharge from office, at which time the bank had been bankrupt and in liquidation for over four years. In the course of these four years, and prior to the agreement with the Assets Company, the liquidators realised assets of the bank and contributions from shareholders to an amount sufficient to enable them to settle with creditors of the bank and obtain discharges of debts to the amount of eleven or twelve millions of pounds. The question is whether their statutory transactions with the Assets Company (and there were no others) imported a sale of a right to challenge any settlement which had been made by them with, and any discharge granted by them to, any debtors of the bank. The contention of the pursuers necessarily is that it did, for they could not distinguish, as their counsel said in answer to questions pointedly put, between a discharge granted to any debtor of his debt and a discharge granted to a shareholder of his liability as a contributory—no distinction with respect to the question of the investment of the Assets Company with a right to challenge such an asset of the bank. It is consistent with my opinion that no distinction favourable to the pursuers can be taken, although I think it proper to add that the right to challenge a compromise settlement with and a discharge of a contributory made with the judicial approbation of this Court may be regarded as exceptionally unfavourable to the contention that the statute imports a

transfer by sale of a right and title to challenge or impeach settlements made by the liquidators in the discharge of their duties to the effect of enabling the purchaser to challenge or impeach them. Such compromise settlements and discharges are made under the provisions of the Companies Act 1862, which necessarily imply the exercise by liquidators of judgment and discretion under such variety of circumstances—submitted to the supervising Court for their approbation—as to be incapable of anything like definite expression, but with power very distinctly conferred upon them “to give *complete discharges* in respect of all or any of such calls, debts, or liabilities”—I quote the words of the Act. With respect to the sanction and approbation of the supervising Court, it may be useful to point out that in the application to the Court to sanction the discharge of Mr Bain, it is distinctly stated that the liquidators are desirous of obtaining the sanction of the Court to the said arrangements “under which *full discharges* will be granted to the parties mentioned in the said list hereto annexed.” I quote these words from the application. Mr Bain was one of these parties. The Court granted the application on 18th March 1879—that is, twenty-five years ago. The deed of agreement and discharge was executed by both parties on 30th April following. The pursuers, founding on a passage in the narrative of this deed, maintain that the arrangement and discharge were conditional. I am unable to assent to that contention beyond this, that the words referred to import what would in my opinion have been implied, and with precisely the same effect, without them, viz., that the liquidators had agreed to grant the discharge in the belief that Mr Bain had honestly and truthfully to the best of his knowledge and belief disclosed the state of his affairs. On the question whether the liquidators sold to the Assets Company any, and if any what, right in the matter (and at present I am dealing with no other), the pursuers were at the time of their agreement with the liquidators, and indeed of their own constitution as a company, aware that many of the bank contributories had “effected compromises with the liquidators or been discharged from future liabilities for calls,” and knew prior to Mr Bain's decease that he was one of them. Their case now must be considered upon the footing that they knew—as they certainly had the means of doing—the fact, and indeed the very terms of his discharge. I am unable to comprehend the position which they now take up, that they purchased and paid for a right to challenge it for their own profit—that is, the profit of this speculative company—in ignorance not merely of its terms but the fact of its existence. There is not a suggestion of any concealment from them. I am indisposed to impute to the liquidators an intention to sell for a price, or transfer gratuitously their right, assuming its existence, to challenge such a compromise or discharge, and do not believe that the Court of Super-

vision would have sanctioned such a sale or transfer. If the liquidators had the right, and it (the right to challenge) were regarded as an “asset” of the bank in the generally understood sense of that expression, the liquidators would, no doubt, have been entitled, and it might have been their official duty, to sell it to any buyer—the highest bidder—as an asset of the bank. But I must for my part reject the notion that it was an “asset” of the bank in the common or, as I think in this case, admissible sense of that word. I proceed upon this view in construing the word “asset” as used in the statutory contract, upon the construction and import of which the question I am now dealing with depends, and am of opinion, agreeing with the Lord Ordinary, that it cannot or ought not to be construed as importing such an unprecedented sale and transfer as the pursuers contend for.

Coming now, at last, to the question whether the pursuers have averred and proved facts entitling them to reduction of the interlocutor and the deed of agreement and discharge specified in the reductive conclusion, I preface what I have to say upon it by observing that the interlocutor dated 18th March 1879 was acted on and implemented by the execution of the deed of agreement and discharge dated 30th April 1879; and that the execution and delivery of that deed, together with the admitted payments of cash and transfers of property thereupon made by Mr Bain to the liquidators, amounted to execution in the sense of implement of the contract by both parties. The liquidators no doubt only represented the bank in liquidation and the interests of those interested in its winding-up, but as such they were the proper lawful contractors with Mr Bain and gave implement to him of the obligation thereby undertaken by them, as he did to them of the obligations thereby undertaken by him. This action at the instance of the Assets Company, as coming in place of the liquidators and vested with their rights, is not for implement by the defenders of the deed of agreement and discharge, but for reduction of it as a nullity *ab initio*. The ground of reduction is not that Mr Bain failed to make full payment of the price specified in the agreement as the consideration for the discharge which he received in return, but that the liquidators would certainly or probably have insisted on a larger price had they known how wealthy he really was, which somehow he had successfully managed to conceal from them.

In the “opinion” appended to the Lord Ordinary's interlocutor of 22nd February 1902 his Lordship says—“The present action was not brought until June 1901, and as brought it was rested solely on the alleged discovery, as the pursuers say, at a ‘recent period’ of the existence of the two promissory-notes by Mr Bain's sons. There was no mention of Mrs Bain's reversionary interest, none whatever. There was, however, a statement that the pursuers had (also ‘at a ‘recent’ date’) dis-

covered that Mr Bain had at his death in 1882 left estate, as disclosed in his inventory, of the value of £3254; and apparently in this connection it was averred (in general terms) that besides the two promissory-notes Mr Bain had concealed from the liquidators assets at least amounting to £3000.

"So matters stood on the summons. The claim was rested entirely on the alleged discovery that Mr Bain had left in 1882 over £3000, and particularly had left the two promissory-notes by his sons, which were given up as part of his estate."

The general averment that Mr Bain had concealed assets amounting to at least £3000 is, as the Lord Ordinary states in his opinion, supported by no evidence whatever, and was not insisted in before him, as it certainly was not before us. His Lordship also notices that "the supposed discovery (by the Assets Company) made after the action was raised that Mr Bain concealed an alleged vested reversionary interest in Mr Potter's estate, turns out, if I may so put it, to be a mere *nidus equinus*." I pass by the reference to Mr Potter's estate with this observation, that any estate of the deceased Potter which is in the hands of his testamentary trustees will, as I must assume, be administered by them according to their duty, and that any party with a legitimate interest therein will have his remedy if they do not.

I thus come to the conclusion reached by the Lord Ordinary that the pursuers' whole case depends upon the alleged concealment by Mr Bain of the two promissory-notes which he had obtained from his sons. It will not be supposed that I, or indeed any of us, doubt that at the date of the deed of agreement and discharge these promissory-notes were negotiable documents of debt. Respecting the circumstances in which, and the understanding on which, they were given and received, I take the facts to be as stated by the Lord Ordinary in his judgment on the evidence, documentary and parole, whatever may be the legal result thereof, that being the question which I am now considering. The promissory-note of James having fortunately been preserved is in process. The markings are interesting, and it may be important as showing why interest was required to be paid half-yearly, the reason obviously being that the £500 for which it was granted was "put into the firm of And. Lusk & Co. on his" (James's) "getting a share in that business," and on which, as his part of the firm's capital, he could be termly credited with interest. From the date of the note (1st January 1874) till April 1879 no payment (except of interest) was made by James to his father, or asked for—a fact of some importance in evidence of the existence of the understanding averred by the defenders. Regarding the £200 then (April 1879) received "in part payment," I take the explanation of it to be that given by James in his evidence as a witness, and agree with the Lord Ordinary in thinking that it suggests no ground whatever for doubting the truth of the

understanding that payment of the advance for which the note was given should not be exigible while the father lived, and that both father and son regarded and acted upon it as in honour binding on both. I say on both, for according to it James undertook to pay the debt on his father's death (as he in fact did), though his promissory-note might then be (as it was) extinguished by prescription and legally worthless.

From William his father never asked or received payment of his promissory-note or the advance for which it was granted. In his evidence as a witness William says,— "He never mentioned it" (the promissory-note) "from the time I signed it until I found his will with the promissory-note inside it. That was after his death."

Both sons knew that their father's desire was an equal distribution of his property at death among his five children should they all survive him, and also their mother, as they did; and that advances made by him to any of them should be deemed part of his estate at death and to the amount of it diminish the share of the recipient. How the equality thus designed by Mr Bain and known to his children was accomplished with respect to his sons James and William, and the advances he had made to them is shown by the "Testament Testamentar of the late Wm. Bain," which shows that the sums, principal and interest, due by each son—by James £306, 5s. 9d., and by William £255, 4s. 8d.—were added to the amount of the divisible residue of Mr Bain's estate, they being credited with payment of their respective notes with interest to date accordingly. On this footing the estate was administered and in 1888 finally distributed by the testamentary trustees among the residuary legatees.

I have referred to these details and the evidence of them as legal and satisfactory proof of the understanding and footing on which these promissory-notes were given by the sons and received and held by the father—proof not by evidence of mere interchange of words, but of the conduct of both parties. I understand the view (however little I may think of it) that while as a man of honour and good feeling Mr Bain might have shrunk from dealing with these notes as negotiable documents of debt, he would have been legally bound to do so by transferring them indorsed to the liquidators if so required, and that the liquidators if informed of their existence, would have failed in the duty had they not so required. I cannot assent to this. Mr Bain would not in my opinion have acted with propriety had he induced, or even allowed, the liquidators to accept the position of indorsees and onerous holders of these notes without informing them how he got them, and as a man of honour held them, and of the position and circumstances of the promissors. Take the case of William's note for £200. William had just lost his bank agency at Lasswade owing to the failure of the bank, and was living with his father as one of the family until some other suitable opening for him was found. Had



his father then endorsed the promissory-note to a liquidator or any other, he would thereby have incurred liability therefor to the holder exactly as if he were himself the promisor—if his son (William) failed to pay on demand.

The same remarks apply to the promissory note of James and need not be repeated. The conclusion respecting both is that had Mr Bain (the father) made the liquidators indorsees of both notes he must himself have paid them on demand, and that the transfer to the liquidators by indorsation would have been an idle and indeed unintelligible proceeding—certainly on Mr Bain's part who knew the facts, and on the liquidators' part also if informed of them, as I agree with the Lord Ordinary in thinking they were. But to put the pursuers' case on the supposition that the liquidators had no information of the existence of these notes, and in that ignorance made with Mr Bain the arrangement and contract which the deed of agreement and discharge expresses, I have pointed out that this contract was in 1879 fulfilled by both parties, leaving nothing to be done under it by either to the other. Suppose the liquidators were still in office and the pursuers of this action brought by them in 1901, and now maintained by them on the ground that they had in 1879 been misled into granting to Mr Bain his discharge on the moderate terms they had agreed to and taken implement of from him in ignorance of the fact that he held two promissory-notes from sons of his to the amount (taking both) of £500, I am of opinion that this would not have been a relevant ground for reducing the contract. Consider on the one hand the magnitude of the contract, the importance to Mr Bain and his family of his discharge from the position of a shareholder of the bank in liquidation and all liability as such, and the large amount he paid for it. Consider on the other hand the amount in 1879 of the unknown wealth of Mr Bain, now, after the lapse of a quarter of a century, averred to have been concealed by him, consisting of his legal right, however improper morally it might have been for him to exercise it, to demand and exact £300 from his son James and £200 from his son William.

In the course of the argument for the pursuers we were referred to the judgment of the House of Lords in the case of the *Standard Insurance Company*, August 1, 1884 (11 R. (H.L.), p. 46), as illustrative of the effect of a provision in a contract that it should be dependent on the truth of the statements made by one of the parties. When that case was cited I pointed out that the action there was not, like the action here, brought for reduction of an implemented contract which had long stood unchallenged, but for implement of a life policy, and brought immediately after the death of the insured against the insurers, who declined to give implement. I at same time ventured to put, as possibly illustrative of my opinion, the case of a policy in exactly similar terms, of which the insurers sought reduction in an action brought by them

twenty years after they had implemented it in ordinary course by payment on the death of the insured, the ground of reduction being in all respects similar to the ground of defence pleaded in the case of the *Standard Insurance Company*.

On the grounds which I have stated I am of opinion that the Lord Ordinary's judgment is right, and ought to be affirmed. If the defenders are not assoilzied another judgment must be substituted, and I have not at present a conception what that other judgment can be. It cannot be a judgment against all or any of the residuary legatees, for there is no conclusion against them. Three of them reside abroad, are not subject to the jurisdiction of the Court, and we can pronounce no judgment against them. If we pronounce a judgment that there is to be a reduction which will constitute a debt, that will be a final judgment in a concluded cause, which will authorise no exaction from people who are not defenders, and not subject to the jurisdiction of this Court in regard to money which they received in 1888, sixteen years ago. I cannot assent to anything but a simple affirmation of the Lord Ordinary's judgment assoilzieing the defenders.

LORD ADAM—I concur in the opinion of Lord Trayner, which I have had an opportunity of considering.

LORD KINNEAR—I am not prepared to express any opinion on the question which your Lordship in the chair has stated as the first which arises in this case, because I do not understand it to be before the Court as now constituted. I mean the question whether the pursuers have acquired right under their agreement and statute to sue an action of this kind against a discharged contributory or his representatives. I agree that if it were before us, it is the first point, because it goes to title to sue, and I am far from underrating its importance or the necessity for considering it. But it was decided, as I understand, by the Second Division before they remitted this case to Seven Judges; and for the present purpose we must of course take that decision as final. Accordingly, it was not argued as an open question, and I am not in a position to express any opinion on the subject.

The first question we are now to consider is whether this action is well directed against the defenders called as Mr Bain's trustees; and I agree with the Lord Ordinary and with Lord Young that it is not a good action against them, and therefore that it is not good against anybody. The only decree sought is against these defenders "as trustees," and if they are not answerable to the pursuers as trustees there can be no decree. But then they are under no liability as trustees, because they have been discharged of all their trust obligations. It was maintained that the deed of discharge by its terms discharged the trustees of nothing more than their intromissions up to date, leaving them still subject to all the duties and liabilities of trustees in so far as regards any part of the estate which they

may not have realised and distributed. I think this construction altogether untenable. By the deed of discharge the whole children of the late Mr Bain, who are also his residuary legatees, accept certain sums as in full of their shares of the residue, and "exoner, acquit, and *simpliciter* discharge" the trustees of their "whole actings, transactions, intromissions, and management," and of their "whole omissions," and also of the trust-disposition and settlement itself. I am of opinion that this is in law a complete discharge which determines the liabilities of the trustees, and determines the trust. I entirely agree with the Lord Ordinary when he says that the trustees have "long ceased to have any connection with the trust-estate;" that they are *functi officii*; and that they have no longer any duty, or for that matter any title, to sue actions or ingather assets. I should have thought this perfectly obvious and familiar if I did not know that a majority of the Court is of a different opinion. But although this makes it probable that my own view may be wrong, I have found myself unable to alter it. I must own that I heard with some surprise the proposition of the pursuers' counsel that beneficiaries who have an absolute right to the entire trust-estate have no power on taking over the estate to discharge the trustees. I had thought that their power to discharge was as certain in law as their right to the estate. It seems to me, indeed, to follow as a legal necessity from the nature of the relation between the trustees and the beneficiaries under the trust. It is a general rule of law that obligations are extinguished by discharge; the only creditors in the trust obligations are the beneficiaries; and accordingly it is familiar doctrine, recognised and carried out in daily practice, that when the trust is performed the trustees are entitled to be discharged by the beneficiaries, provided that they are *sui juris*, and that their rights under the trust are absolute. Accordingly the form of an absolute and complete discharge is to be found in the style books as an instrument in common use; and it is matter of familiar practice that if beneficiaries refuse to grant a complete discharge, the trustees are entitled to bring them into Court by an action to compel them to grant it, or else to obtain a judicial discharge by a decree which assumes the right and duty of the beneficiaries. It was said in argument that such decree depends on the authority of the Court and implies nothing as to the power of beneficiaries; and I do not doubt that the Court may discharge trustees by its own authority in virtue of its general power to control the administration of trusts. But that is a different thing from a judgment as between parties, that trustees have right to their discharge; and a judgment to that effect necessarily implies power in the party against whom it is directed to do voluntarily what the Court orders to be done. That such a discharge puts an end to the trust is, in my opinion, beyond question, and I think it will be found that the right of trustees to obtain a

discharge to that effect is stated in the text-books as familiar doctrine. Professor Menzies, for example, says:—"The trust is brought to an end by transferring the property to those beneficially interested, and by their granting, on the other hand, a discharge and exoneration in favour of the trustees." And this is entirely in accordance with principle, because the beneficiaries are the true and only creditors in the trust obligations. This is settled by the case of the *Globe Insurance Company v. Scott's Trustees*. There is no fiduciary relation between the trustees and the creditors of the deceased testator. They are debtors to the testator's creditors, not by virtue of trust, but because they represent the deceased; and their liability as such debtors is at an end when, after a due course of administration, they have made over the trust estate to the beneficiaries. They do not even stand in need of a discharge to determine their liability to the creditors of the trust, because the rule is that they are in safety to pay away the trust funds in terms of the trust after the lapse of six months, and are under no liability after that time except to the extent to which they may have funds still in hand, to meet the claims of creditors who have not come in and given notice of their claim before the six months had expired. If the character of trustees therefore is not indelible, there is nobody who can require the trustees to continue in the administration, and nobody who can discharge the trust, except the beneficiaries; and the pursuers do not maintain that the trust character is indelible. They conceded, and those of your Lordships who are for sustaining the action have held that they are right in conceding, that the rights and liabilities of the trustees may be determined by resignation. And yet they maintain that they cannot be determined by discharge. But it seems to me that there can be no more effectual form of resignation than the acceptance of a discharge. Both the one and the other operate as a surrender of his functions by the trustee, and an acceptance of that surrender by the beneficiaries; and the creditors of the deceased have no more to do with the one than with the other. It is said that the testator imposed upon his trustees the duties which they have accepted, and that nobody else can relieve them of that trust. But the duty he imposed was to recover his estate, and after satisfying a life-rent right which has come to an end, to pay it over to his residuary legatees. If the life-rent has been satisfied, and the residuary legatees have obtained payment and delivery of the estate with which they also are satisfied, I have not been able to understand what is to hinder them from granting a final and complete discharge, in respect that they are satisfied. And if they have done so, what remains of the trust? I listened to the pursuers' counsel for an answer to that question in vain. There can be no liability to the residuary legatees, because their own discharge is a conclusive answer to any demand at

their instance. There can be no liability to the trusters' creditors, because the trustees have divested themselves of the trust-estate in a due course of administration. It is "settled law that if trustees and executors after six months pay away the funds even to legatees, in the reasonable belief that debts have been satisfied, they cannot be made responsible, although if there was from the first a deficiency of funds the legatees may be obliged to pay back what they have got to the unpaid creditors." It is out of the question for the pursuers to say that the trustees were under any obligation to anticipate the present claim at their instance. When the estate was made over to the beneficiaries the pursuers' claim was absolutely excluded by the liquidators' discharge. They did not bring forward their claim within six months from the testator's death. They bring it forward after eighteen years, and in order to maintain it they must begin by reducing a discharge to the testator which his trustees were entitled and bound to consider valid. But then they say there is a part of the estate still outstanding. That can make no difference. If it be so, it is the residuary legatees and not the trustees who have right and title to enforce that outstanding claim. The discharge determines the trustees' title to sue, because their title to ingather and their duty to distribute are correlative; and their duty to distribute has come to an end. It is of no consequence to say that those who granted the discharge might have withheld it if they had thought fit until something more was recovered for their benefit. For the satisfaction of the creditor and his discharge in respect thereof extinguishes the obligation, whether it has been exactly performed or not. The trustees are discharged of their "omissions" as well as of their intromissions. For these reasons I agree with the Lord Ordinary that a decree under the petitory conclusion (to which alone the pursuers' counsel directed their argument) must be perfectly futile. It will not be *res judicata* against the residuary legatees, because they are not represented in any way by the so-called trustees. And it will be perfectly ineffectual against the defenders actually called, because, admitting that they were once trustees, they have a conclusive answer, to wit, that the trust is at an end and that they have no trust funds in their possession. If the pursuers attempt to put the decree in force it must be by a charge for payment. But the charge must be directed against the defenders as trustees only, because no personal decree is asked against them. And if the defenders were charged as trustees to make payment of £63,000, or any sum within that amount, they would be entitled to suspend on the ground that they had parted with the trust-estate and been discharged of all liability as trustees. That that would be a perfectly good ground of suspension is in my opinion not open to question. It has frequently been so decided. I take, for example, the case of *Beith v. Mackenzie*,

where a trustee suspended a charge on the ground that he had no trust funds; and Lord Young pronounced this interlocutor:—"Finds that the complainer acting as trustee under the settlement of the deceased is not in possession of any trust estate to answer the debt charged for, and that there are no grounds by reason of improper payments or otherwise for subjecting him in personal liability, and therefore suspends the charge"; and this interlocutor was affirmed in the Inner House. The first of these two findings disposes of the charge in so far as directed against the trustee as such. The second deals with the question of personal liability, which does not arise in the present case, because the pursuers do not allege personal liability. But that only shows that in the present case the first finding is apposite and sufficient, even on the assumption that the defenders are liable as trustees. In my view they would have a conclusive answer, which would exclude the necessity for relying even on the first finding, because the true ground of suspension would be that they are not acting as trustees under William Bain's testamentary settlement. But I must assume that to that it would be replied that decree had gone out against them as trustees, for I understand that your Lordships will so decide. And the point is that on that assumption it will be an unanswerable ground of suspension to say that they have no trust funds, because by the concession involved in the terms of their decree the pursuers will be precluded from maintaining that if they have no funds they ought to have them, and must recover them or be personally answerable. It appears to me therefore that a decree in terms of the petitory conclusion will be inoperative, and the Court ought not to pronounce decrees that must be futile.

But the pursuers being pressed by this difficulty have endeavoured to meet it by arguing that the action is not what it purports to be, a petitory action for the payment of money. And, in the first place, they say that what they ask for is a decree *cognitionis causa tantum*. On this point I entirely agree with the Lord Ordinary, except perhaps in so far as his language may appear to imply that a proceeding *cognitionis causa tantum* is applicable only to heritable estate, and must be directed against the heirs. But this certainly cannot have been his Lordship's meaning. It is equally appropriate for the enforcement of claims against the *hereditas jacens* of moveables, when it must be directed against the next-of-kin. But the material point is that in either case it assumes that there are effects or estate *in bonis defuncti* which the creditors of the defunct are entitled to attach by diligence, and its whole force and effect is to prevent the legal heirs or executors of the dead man from taking up the succession, and so to leave his estate open to the diligence of his own creditors. It is not a personal action for payment. It is a diligence against the estate of a deceased

debtor. In the case of a moveable succession, the procedure, which is analogous to that of adjudication in heritage, is regulated by the Act 1695, cap. 41, which enables the creditor to "charge the defunct's nearest of kin, which shall be a passive title against the person charged unless he renounce, and then the charger may proceed to have his debt constitute and the *hereditas jacens* of moveables declared liable by a decree *cognitionis causa tantum*, upon the obtaining whereof he may be decerned executor-dative to the defunct, and so affect his moveables in common form." There are two points to be observed—(first) that the proceeding must be directed against the next-of-kin, or in other words against the representatives *ab intestato*, because nobody else can renounce the succession which the law opens to them, and (secondly) that the proceeding can never result in a personal decree for payment, but simply in opening the estate to diligence. If the next-of-kin renounce, a decree will be pronounced to enable the pursuers to be confirmed as executors creditors. If they refuse to renounce they will render themselves liable for the deceased's obligations as intromitters, and his creditors may proceed against them by action in common form. The form of decree is that the Lords, "in respect of the minute of renunciation by the defenders, assoilzie them from the passive titles, but decern against them *cognitionis causa tantum* to the end and effect the pursuer may attach as law will the *hereditas jacens* of the defunct." This is the exact effect which the statute gives to the decree. It makes the *hereditas jacens* liable. It follows, in my opinion, that a decree *cognitionis causa tantum* in an action for payment against testamentary trustees who have confirmed as executors is a legal impossibility. The decree assumes that the estate of the deceased is still in his *hereditas jacens*, and it has no other end or effect than to enable the pursuer to attach the *hereditas jacens* as law will. The action assumes that there is nothing left in the *hereditas jacens*, because the effects have been taken *ex bonis defuncti*, or out of his *hereditas jacens* by the confirmation of his testamentary trustees. The latter are therefore liable as representing the deceased to action at the instance of his creditors, and the diligence of executors creditors is absolutely excluded. The two remedies are mutually exclusive. There can be no decree *cognitionis causa tantum* against testamentary trustees. The pursuers' counsel cited *Forrest v. Forrest* as deciding that such a decree is competent. I do not so read that decision, and even if my interpretation of it were wrong, the case would not be in point. An action was brought against the unconfirmed executors-nominate and the next-of-kin of a deceased debtor; and as an ordinary action it was perfectly well laid, whether well founded on its merits or not. But in the course of the procedure the pursuer restricted his demand to a decree *cognitionis causa tantum*, and decree to that extent was pronounced against all the defenders. This is,

no doubt, an instance of a decree *cognitionis causa* pronounced against executors-nominate, and it would appear that one of them was not amongst the next-of-kin. But the next-of-kin also were called, so that the decree would be perfectly effectual although an executor-nominate were somewhat irregularly joined with them; and there was no question raised and no discussion as to the competency of directing such a proceeding against anybody but the successors *ab intestato*. The Lord Justice-Clerk (Inglis), in explaining the alternative courses which the procedure opened to the legal successors of the deceased, confined his observations exclusively to the next-of-kin; and it is not possible that so exact a lawyer should have said anything to suggest that executors-nominate, not being next-of-kin, could be called upon to renounce the succession on pain of liability under the passive titles. No question appears to have been raised as to the distinction between one defender and another; and the Court having determined the responsibility of the next-of-kin, it seems not to have been observed in framing the formal judgment that one of the defenders called did not belong to that class. The irregularity was of no practical importance, because the *hereditas jacens* was effectually made liable by the decree against the next-of-kin, and the decree as against the other defender created no personal liability. But even if it should be held that there was no irregularity, and if the case must be taken as a decision that decree *cognitionis causa* may be directed against unconfirmed executors, it would be no authority for the present purpose. On that assumption it would still be preposterous to call upon testamentary trustees to renounce, that is, to abstain from taking out confirmation after they had been already confirmed, in order to do diligence against the *hereditas jacens*, when they had already taken up the estate. But the question which was not raised in *Forrest v. Forrest*, 1 Macph. 806, was formally decided by the First Division in the previous case of *Smith's Trustees v. Grant*, 24 D. 1142; and the Second Division could not have decided anything contrary to that most important judgment without a full exposition of their reasons, or probably without calling in the other Judges. In *Smith's Trustees v. Grant* there was a charge to the next-of-kin of a deceased debtor to confirm, an action of constitution was afterwards raised against them, in which they appeared and renounced the succession, and decree *cognitionis causa* was pronounced. In certain subsequent proceedings, which it is unnecessary to detail, it was objected that the summons of constitution was wrongly directed against the next-of-kin, because the deceased had left a trust-settlement naming trustees and constituting them executors. It was held that the proper defenders were the next-of-kin, and not the testamentary trustees; that testamentary trustees could not be called upon to renounce the succession, such renunciation being appropriate to heirs and none

and that decree *cognitionis causa tantum* could not have been taken against testamentary trustees. The history of the procedure and its legal meaning and effect are explained in the very elaborate and instructive opinions of Lord Kinloch and Lord Curriehill, and I refer to these opinions as authority for the views I have already expressed.

But it was further argued for the pursuers that if this is not a proceeding *cognitionis causa tantum*, it is an action of constitution, and as such effectual, although it may have no operative conclusion. The learned counsel did not explain the exact meaning of this distinction. Every petitory action which is not founded on a liquid document is an action of constitution, although the constitution may be implicit instead of being expressed in form. But an action of that kind concludes for a decree enforceable against the defenders, and it is equally enforceable whether they are called as individuals or as trustees, although in the latter case they are required to make good the debt out of trust funds only. The supposed distinction simply sends us back to the original question whether there can be a good decree against discharged trustees who hold no trust estate, and who are under no personal liability. If it be meant that the decree will ascertain the debt and do nothing more in the way of authorising diligence either against the estate of the deceased or against the defenders as trustees, or otherwise, it will be totally inoperative, and I know of no authority for such a decree in our practice. I quite understand the value of the constitution implied in a decree for payment of the debt of a deceased person, when the action is directed against trustees who are administering the estate, and are therefore the proper defenders both of the estate and of those who are beneficially interested in it. If there is a deficiency of funds in the hands of the trustees, such a decree may no doubt enable the pursuer to follow the trust estate into the hands of gratuitous legatees. But it is in my opinion of no value whatever when it is directed against trustees who have been discharged, who hold no trust funds, and who have no right or title to administer estate which has already passed into the hands of the beneficiaries under the trust.

What I have already said applies to the petitory conclusion. But it must not be forgotten that there is also a conclusion for reduction, and that it is not until they have obtained decree of reduction that the pursuers can proceed to their claim for payment. To this part of the case the whole argument about decrees of constitution and decrees *cognitionis causa* seems to me inapposite. A decree of reduction *cognitionis causa tantum* is a contradiction in terms. But that brings us back to the old question in exactly the old form, whether a decree of reduction against the only defenders who are called will be valid and effectual against the persons interested in resisting it. It must be conceded to the

pursuers that the decree of reduction, if they obtain it, will not be like the decree for payment, futile on their own showing, because, I suppose, they cannot be allowed to obtain it except on the footing that it will be *res judicata*. When they afterwards make their claim, although not in this action, against the beneficiaries, the latter will not be able to answer by tabling the discharge, because *ex hypothesi* the discharge has been reduced by a decree which is good against them. But that only brings out more distinctly what I think the radical vice of this proceeding, that it attempts to set aside the discharge of a contributory by an action against persons who have no title or interest to maintain it, and without calling the children and residuary legatees who have a most real and substantial interest.

I ought to advert to another argument which I rather think received some favour. It was said that if this action fails the pursuers can have no other remedy which will enable them to reach certain funds which undoubtedly belong to the trust-estate. With great deference, I am very clearly of opinion that if the pursuers have a good right to recover these funds, their difficulties about procedure are wholly imaginary. The fund in question is a sum of over £2000, which is said to be now in the hands of another set of trustees—the trustees of the late Mr Potter. It appears that under Mr Potter's will Mrs Bain, the wife of the contributory, was entitled to payment of a certain sum on the lapse of a life interest; that this sum vested in her during the subsistence of her marriage; that it was therefore carried to her husband *jure mariti*; that after his death the life interest died and the greater part of the bequest was thereupon paid by Mr Potter's trustees to Mrs Bain, and that the sum in question, being the balance of the bequest, is still in the hands of Potter's trustees. All this I understand to be matter of admission between the parties. It follows, according to the pursuers, that the right to Mrs Bain's legacy vested in her husband and passed to his testamentary trustees; that the payment to Mrs Bain was a mistake, and that the unpaid balance now belongs to Mr Bain's representatives, and not to the representatives of Mrs Bain. The pursuer's point was put in two ways. In the first place it was said that the trustees were thus vested in property of which they have never been divested, and that it follows that they alone have a title to sue Mr Potter's trustees, and that without their assistance the beneficiaries can never recover the sums still due to them. I assume that the right in question vested in Mr Bain and passed to his trustees. But it was not a right of property. It was a prospective right of action which emerged as an effective right on the death of the life interest, after the death of Mr Bain. But that is not a right which required any formal conveyance or assignation by the trustees to make it pass to the beneficiaries on the determination of the trust. They would have no difficulty in recovering

the money, if the pursuers' claim were out of the way. Their title to sue rests on their beneficial interest. So long as the trustees were in the administration of the estate, their title as administrators would be preferable to that of the residuary legatees. But the moment the administration is at an end, and the title of the trustees discharged along with their liabilities, the beneficial title is disencumbered of that burden, and the residuary legatees are entitled to sue in their own names. Their title depends on their right, and their right is *ex hypothesi* beyond dispute. The probability is that Mr Potter's trustees would be advised to pay on demand; but if for their safety they insisted, as they might, that the claim should be constituted by decree, there can be no question as to the result of an action for that purpose. It is extravagant to suppose that in a competition between the discharged trustees and the beneficiaries whose discharge they had accepted, if such competition be assumed as possible, the beneficiaries would not prevail. The second point was that even if the beneficiaries could recover, the pursuers would have no remedy except through the intervention of the trustees. It is not for us to advise the pursuers. But the ordinary remedies known to the law are open to them. If they have a good claim there is nothing to prevent them from raising an action against their true debtors and arresting on the dependence. If the funds are supposed to be *in hereditate jacente* of Mr Bain, which seems hardly maintainable, there is nothing to prevent their being confirmed as executors creditors *ad omnia*. This would not be followed, as in general it may be, by the continuance of the original management, because the discharge would be a good answer to the trustees, if they were required to proceed, and would enable the creditors to demand confirmation in their own name. If they have no remedy on either footing the inference is that they have no right.

But finally, it is said that if the defenders' plea against the competency is well founded, they are barred from maintaining it because they have put in defences on the merits. I agree with Lord Young that their pleadings are not improper nor inconsistent with their position. But if they are not consistent, that cannot prejudice the beneficiaries, and therefore it will not support the action. If defenders are not bound to appear, there may be cases in which their appearance will preclude them from maintaining the preliminary plea. But that can only be when it is a plea in their own interest. It is familiar practice that an objection to citation, or an objection to jurisdiction, may be departed from. But if the plea is that the interest and title to defend are not in the defenders called, but in other persons whom they do not represent, these others cannot be affected by the mistakes of the actual defenders. The objection is that the defenders are not the proper contradictors, and the answer is that a judgment against them will nevertheless be

*res judicata* because they have blundered the defence.

I need hardly add that the case of *Falla's Trustees* is not, in my opinion, a decision in point. An action against a discharged trustee was conjoined with an action against the beneficiaries. The Lord Ordinary allowed a proof and refused in the meantime to dismiss the case against the trustee, because he was not satisfied of the fact on which his defence was rested. That decision was undoubtedly right; and the *dicta* which have been cited from his Lordship's opinion, and were not necessary for the decision, are not binding upon the Court nor upon the learned Judge himself. The decision was affirmed in the Inner House, but the *dicta* were not repeated. The beneficiaries were parties to the conjoined actions; and the opinion of the Lord President makes it perfectly clear that the Court decided nothing as to the validity of any decree which might be taken against a discharged trustee alone in the absence of the beneficiaries.

For these reasons I am unable to find any solid ground for sustaining the action as laid. The logical consequence would be that I should express no further opinion, because no judgment in this case should be allowed to affect the interests that are really involved. But I am aware that the decision of the Court will not be in accordance with my opinion; and it is therefore proper that all the Judges should state their views upon the merits. I approach this part of the case, however, on the assumption that it has been already decided that the pursuers have right to set aside the discharge of Mr Bain for their own benefit, if they can show that the conditions on which it was granted have not been satisfied. I confess to thinking that this arrangement puts the defenders to some disadvantage, because the branch of the argument which remains to them is not, perhaps, so completely separable as may have been supposed from the branch on which decision has been given against them. But we must take the case as it is put before us; and, on the assumption which I have stated, I have come, with reluctance, to the conclusion that the defence on the merits cannot be sustained. I cannot say, however, that I entirely agree with everything that has been said in support of that conclusion. I sympathise very much with the Lord Ordinary's view upon the question of *mora*. I think the pursuers have given no satisfactory excuse for their delay in raising the action, and that the delay may have prejudiced the defence in the way pointed out by the Lord Ordinary. I therefore agree that on questions of fact, and especially on the question of fraud, every reasonable presumption must be allowed in favour of the defenders, and against the pursuers' case. But I know of no authority for holding that the plea of *mora* affords an absolute defence in law. Its bearing is on the question of fact; and its weight in the present case appears to me to be diminished, because that question, in my opinion,

depends on admissions and on written documents, rather than on parole testimony. I should have been of a different opinion if I had thought it necessary for the pursuers to prove fraudulent intention on the part of Mr Bain. But I see no necessity, and on the evidence I see no room for any such imputations. I do not, however, agree exactly with the view taken by the Lord President, of the meaning and effect of the discharge under reduction. I do not read that document as importing a warranty by the contributory of the exact accuracy and exhaustive completeness of his statement of assets including rights or claims which might not be within his knowledge at the time. The discharge proceeds on the truth and completeness of his statement, but his statement is made "to the best of his knowledge and belief," and is accepted on that footing by the liquidators. I am of opinion, therefore, that the pursuers have no case upon the failure of Mr Bain to disclose the claim, which it is now discovered had arisen to him *jure mariti* for his wife's share of Mr Potter's estate. But I am unable to resist the conclusions that he was perfectly well aware that he held documents of debt granted to him by his sons, that these were enforceable at law and formed assets of his estate of their nominal value, and that he was bound to disclose these assets to the liquidators. I do not think that the theory that the promissory-notes by his sons represented advances to account of their shares of patrimony can be sustained. It is true that when a father advances a sum to launch his son in a profession or business, it may reasonably be presumed that he does not intend to create a proper debt, of which he may immediately demand repayment with interest, and enforce his demand by diligence, so as to disappoint the very purpose for which the money was given. But the presumption is one of fact. In the cases in which the question has arisen it has always been treated as one of fact; and the test which has, I think, been generally accepted, is to inquire whether the father has or has not taken a document of debt from the son. But in the present case that test is conclusive against the defenders. A loan of money upon a promissory-note creates a proper debt, whether the promisor is a son or a stranger; and I cannot think it doubtful that Mr Bain had a legal right, by virtue of the promissory-notes, which might have been enforced by diligence, and which would pass to executors or creditors. It may be that it would have been cruel, and, as Lord Young has said, unfatherly to enforce the claim; and I do not dispute that Mr Bain was very unlikely to have done so. All the evidence goes to show that, to say the least, he would not have been an exacting creditor. But he retained the absolute control and disposal of the matter in his own hands, and the right which beyond question remained in him so long as he was *sui juris* to enforce the debt, or to abstain from enforcing it, passed from him to the

liquidators, when he undertook to surrender his whole means and estate to them. He was bound in my opinion to disclose the existence of the promissory-notes, and to leave it to the liquidators to judge whether the debts should be enforced or not. I think the condition on which the discharge was granted was not performed because he failed to make that disclosure. But I see no ground for charging him with fraud. I see no difficulty in supposing that he may have justified himself to his own mind by considering that he had not intended to sue his sons as debtors, and he may very possibly have thought that his intention prevented the advances from being treated as debts. But such intention was never expressed so as to bind him, and his inference, if so it were, did not alter the facts, or displace the duty to disclose the facts as they stood. I proceed therefore upon the necessary inference from the documents and the admitted facts. I do not think that inference can be displaced by any assumption as to what might have been proved as to his intention if witnesses had survived whose evidence has been lost, because even an expressed intention would, in my opinion, have been immaterial, unless it were expressed in such a form as to exclude the legal operation of the promissory-notes, or, in other words, unless it were embodied in a written discharge, or manifested by the cancellation of the notes. Nor do I attach importance to the hypothesis that he might have disclosed the existence of the promissory-notes to Mr Jamieson. I agree that we cannot assume that the liquidators would have agreed to the discharge on the footing of any legal claim at the instance of a contributory being abandoned without recording that condition for the consideration of the Court. It is hardly enough to say that they were in the habit of bringing important questions of compromise before the Court of Supervision, because in the order by which the liquidation was put under supervision, the liquidators were expressly prohibited from making any compromise with a contributory except with the special leave of the Court. But I am not disposed to speculate about possibilities of that kind, because the condition of the discharge is not that the contributory shall have told everything verbally to a liquidator, but that the written statement is to his knowledge truthful and complete. I cannot say I am satisfied that this condition was performed. I have come to the conclusion, therefore, that on the assumption already explained, the defence on the merits cannot be sustained.

LORD TRAYNER—In October 1878 the City of Glasgow Bank failed and went into liquidation. At that time the late Mr Bain was manager of the bank in Edinburgh and held £1200 of its capital stock. Mr Bain in respect of that holding was placed upon the list of contributories and calls were made upon him by the liquidators to the extent of £33,000. Mr Bain being unable

to meet the calls, proposed to the liquidators, as many others were doing, to surrender his whole estate in return for a discharge of all liability as a contributory. It was an advantage to Mr Bain to receive such a discharge if possible in order to avoid the alternative of bankruptcy and sequestration of his estates, as he had then received an important appointment in another bank with which bankruptcy might seriously have interfered. On receiving Mr Bain's proposal the liquidators furnished him with a list of questions to which they required his answers, and on receiving them and after some inquiry the liquidators agreed to the proposal. The questions put to Mr Bain and his answers are printed *in extenso*, but the only part of them to which it is necessary to direct attention are questions 2 and 4, and they are as follows:—"2. What property do you possess, and what is its nature and value to the best of your knowledge and belief? Specify the particulars, if necessary, in the separate signed list or schedule A, etc.—*Ans.* (No property). Certificates of stocks held, see schedule A. 4. What is your regular or average income, and from what sources is it derived?—*Ans.* £1200 as manager of City of Glasgow Bank Edinburgh." The schedule referred to in answer 2 contained a statement of Mr Bain's affairs as follows:—

|  |            |
|--|------------|
| 175 shares in Standard Investment Company at £2, 6s. per share       | £ 402 10 0 |
| 50 shares the Imperial Credit Company, Limited, surplus Certificates | 340 0 0    |
| Furniture p. valuation   | 168 13 0   |
| Life Policy surrender value  | 709 10 0   |
| Cash at credit of account in bank                                    | 235 0 0    |
| Cash to be paid down   | 600 0 0    |
|  | £2455 13 0 |

Mr Bain (as required) made a solemn declaration that the answers he had given to the several questions put to him were true and correct answers "to the best of my knowledge and belief." Thereafter an agreement and discharge was entered into and executed by and between the liquidators of the bank on the one part and Mr Bain on the other, which bears, *inter alia*, that Mr Bain in answer to certain queries addressed to him by the liquidators had made and verified by a solemn declaration "a written statement of his affairs, means and property in possession or expectancy," and that the discharge which the liquidators then granted was so granted to Mr Bain "on the basis and on condition of the truth, accuracy, and completeness of the said statement of his affairs, means and property." The pursuers now seek to reduce this agreement and discharge, on the ground that the state of affairs given up by Mr Bain was not true, accurate, and complete. If the discharge is set aside, then Mr Bain's liability (or that of his estate) for the full amount of the calls made upon him will revive (less of course the amount which Mr Bain paid) and it is for this balance with interest that

the pursuers now seek decree in their petitory conclusion. The defenders' position is that the condition of the agreement and discharge is fulfilled if the state of affairs given up by Mr Bain was true, accurate, and complete according to the best of Mr Bain's knowledge and belief at the time. In short, the pursuers contend that the condition and basis of the agreement and discharge was the truth, accuracy, and completeness of the state of affairs in point of fact, whereas the defenders' view is that it was enough if the state of affairs was true, accurate, and complete relatively to Mr Bain's knowledge and belief. In support of this construction of the agreement the defenders refer to the terms of question 2 and the declaration made by Mr Bain. It was argued by the pursuers that the words in question 2 relied on by the defenders referred merely to Mr Bain's belief as to the value of his property, and not to the question "what property do you possess." I confess to thinking that the fair reading of question 2 is that maintained by the pursuers. But it might certainly be read by Mr Bain as the defenders now read it, and therefore I am disposed (if the questions and answers can be looked at in construing the agreement) to give Mr Bain any advantage that such a reading might confer. But in my opinion it is not admissible in construing the agreement to modify its terms, or interpret its language (if not ambiguous) by any reference to the questions or answers, or correspondence, or anything else that took place prior to the execution of the agreement. The agreement embodies the terms of the transaction on which the parties to it were agreed—it is the ultimate expression of a bargain to which the questions and answers, as well as the correspondence, were only the antecedent communings or negotiations, and it is observable that the agreement is not conditional on the questions and answers (which are referred to only by the way of narrative), but only on the written state of affairs. That state is the basis on which the agreement proceeds. Taking then the words of the agreement, there does not appear to be any ambiguity, or anything open to construction. The condition and basis of the bargain is the "truth, accuracy, and completeness of the said statement of his affairs, means, and property," and the said statement of his affairs is the "written statement of his affairs, means, and property in possession or expectancy" which Mr Bain had sent to the liquidators. By what standard is the truth, accuracy, and completeness of the state of affairs to be tried, except by the fact as it existed? That is certainly the primary and natural meaning of the language used. If that meaning was to be restricted or qualified, this should have been indicated by some words importing qualification. If I am right in thus construing the agreement, there is practically an end of the case, for it is admitted now that Mr Bain was possessed of means and estate not disclosed in his written state of affairs. He had *jure mariti* property worth



several thousand pounds in the trust estate of his brother-in-law Mr Potter, and he held two promissory-notes of the *cumulo* value of £700, granted to him by his two sons. Accordingly the written state of his affairs and property as given up by him was not true, accurate, and complete in point of fact, and as that, the condition and basis of the agreement and discharge, fails, the agreement and discharge cannot stand.

But assume that the defenders are right in maintaining that the condition of the agreement was that the written state of affairs was to be true, accurate, and complete only in so far as consistent with the knowledge and belief of Mr Bain, is the result different? I think not. I have said, and it is the fact, that when the state of his affairs was given up by Mr Bain, he held two promissory-notes granted to him by his sons, one for £500 and the other for £200. He knew of their existence; it is not pretended otherwise. On the promissory-note for £500 (dated 1st January 1874) he had received from the granter of it, regularly every half-year, interest at the rate of 5 per cent. from the date of the note down to (and after) the date of the discharge now challenged. In the same month in which the discharge was granted he asked and received repayment of £200 to account of the principal sum to enable him to settle with the liquidators. The existence of that promissory-note was therefore quite prominently before his mind at the time he was giving up his written statement of his assets. It is not possible to doubt that the existence of the promissory-note for £200 was also present to his recollection. But these promissory-notes were not entered in the written state of his affairs given up by Mr Bain. On the assumption with which I am now dealing with the case I do not think that the non-disclosure of the right which Mr Bain undoubtedly had *jure mariti* in the Potter estate can be pleaded against him, because he did not know of his right, and had always regarded the Potter estate as the separate property of his wife, with which in fact he never interfered or intromitted. He was therefore I think quite excusable in not entering it in his state of affairs, because to the best of his knowledge and belief it was not his. But I cannot say the same with regard to his answer to question 4, in which he was desired to state his regular or average annual income, "and from what sources it is derived." The answer given was "£1200 as manager of City of Glasgow Bank, Edinburgh." Now, Mr Bain was then, and had been for years, in the regular receipt of £25 a-year from his son, being the interest due on the promissory-note for £500 already referred to. That was not disclosed, and therefore the state of affairs was to this extent inaccurate and incomplete in the knowledge of Mr Bain. No doubt the amount is small, but it is not the less a distinct inaccuracy. The importance of that non-disclosure, however, is enhanced by the fact that Mr Bain was asked not only to state what was his regular income, but also to say whence it was derived.

Now, to have disclosed the source of the yearly income of £25 would have disclosed the existence of the promissory-note, which had not been, and I think was not intended to be, disclosed, although forming part of Mr Bain's estate and assets. Accordingly, whether the discharge is regarded in the view maintained by the pursuers, or on that urged by the defenders, I think it is clearly proved that Mr Bain's written state of affairs was not true, accurate, and complete, and was not so within his knowledge and belief. The defenders, however, maintain that Mr Bain was not bound to give up the promissory-notes in his state of affairs, because they were not assets—not debts by the sons—but advances made to them to account of their patrimony which they were under no obligation to repay. This contention the Lord Ordinary does not sustain. He thinks these promissory-notes were assets of Mr Bain "and ought to have been disclosed." I agree with him in this; and indeed having regard to the proof before us I think it is impossible to hold otherwise. In the first place, the granters of these promissory-notes when examined as witnesses are unable to say that their father Mr Bain ever said or did anything entitling them to regard the advances made to them as other than loans, except that he did not ask for repayment. I can quite believe that Mr Bain would not have applied to them for repayment so long as he could possibly meet his necessities from any other source. But how did he treat this matter when his great necessity came upon him in 1879. He applied to his son, who had granted the note for £500 (whose financial position was better than that of his brother), for repayment of part of that debt. It was not asked as a favour or as a gift but as payment. The son (James Bain) says—"When my father in 1879 in order to settle with the bank asked me to pay £200 it was I believe by letter, and that has gone. (Q) When you paid that £200 did you understand it to be a gift to your father or repayment?—(A) Repayment; he regretted having to ask me for it. (Q) Then he asked it as repayment?—(A) He did not demand it. He asked me for it as part of the money due on the bill, and I paid it in that capacity." If in addition to this anything were needed to show that the promissory-note for £500 constituted a debt it will be found in the letter which Mr Bain addressed to his son when the advance was made. It was treated by Mr Bain as a business transaction, and he put it eminently on a business footing. Mr Bain as a banker knew very well the difference between taking a promissory-note for a loan or advance and taking a receipt as for payment towards patrimony—the one importing obligation and the other not. Knowing this it is difficult to believe (especially with the letter of 2nd January 1874 before one) that Mr Bain took a document which did not correspond to his purpose and intention. But it was said that Mr Bain could at any time have turned these loans or advances into

gifts by destroying the promissory-notes. No doubt he could so long as he was solvent. But when he became insolvent he could not without committing a fraud upon his creditors, and in 1879 when he gave up his state of affairs to the liquidators of the bank he was insolvent and could no longer make a present to his sons. He had nothing to give; his whole estate belonged to his creditors. But not only were these promissory-notes treated by the late Mr Bain as representing debts due by his sons—they were so treated by the sons after their father's death. These promissory-notes were included as part of Mr Bain's moveable estate in the inventory given up by his executors for confirmation.

It only remains on this part of the case to notice the ground, I think the main ground, on which the Lord Ordinary has proceeded in deciding against the pursuers. His Lordship says—"The question remains whether they (the pursuers) have proved so as to enable the Court to affirm as a thing beyond reasonable doubt that as regards these promissory-notes Mr Bain did in fact fail to inform the liquidators of the true position. And my conclusion upon the evidence is that the pursuers have not so proved. I am not satisfied that Mr Bain failed to disclose the facts such as they were to the liquidators."

This part of the Lord Ordinary's opinion follows immediately the passage I have already cited, in which he says that the promissory-notes were assets of Mr Bain and ought to have been disclosed. If that is so (and I agree with the Lord Ordinary in thinking that it is), when should the disclosure have been made, and if made where would it appear? Surely in the written state of his affairs which Mr Bain gave up. But that state of affairs contains no such disclosure, and there is no presumption that any disclosure of estate was made which does not there appear. Mr Bain was asked to give up a statement of his whole assets, and to say what in his opinion was their value. He did not do so. What may have been his motive for not disclosing the existence of the promissory-notes is not the question. The question is one of fact. Did Mr Bain or did he not disclose this part of his estates to the liquidators. He professed in his written state of affairs to give the particulars of his whole estate, and in that state the promissory-notes do not appear. The pursuers having proved this required to prove nothing more to show that there was no disclosure. If the defenders relied upon a disclosure, it lay with them to prove it. They have led no proof whatever in support of such a view; they do not even say upon record that such disclosure was ever made. The Lord Ordinary finds his presumption that there was a disclosure rather than concealment on the "position and character" of Mr Bain, who could not lightly be assumed to "have been guilty of a deliberate fraud." Against Mr Bain's character or position I have nothing to say. But I think the character

and position of the liquidators are also entitled to a consideration which the Lord Ordinary has not given them. Suppose that Mr Bain disclosed to the liquidators that he held the promissory-notes; that they were of full face value, which they were, but added that he had intended these as advances to his sons towards their patrimony—the duty of the liquidators would plainly have been to demand delivery of the promissory-notes and insist on payment. They were debts due to Mr Bain, and realisable—they amounted in value, roughly, to one-third of the whole sum which Mr Bain was proposing to pay for his discharge—one-fourth of his whole estate, including the promissory-notes. It would have been a gross failure in duty on the part of the liquidators to leave these promissory-notes in the hands of Mr Bain; it was making him a present of £700, and that £700 virtually taken out of the pockets of the few solvent contributors who were paying their calls in full. If the liquidators had done this they would necessarily have explained to the Court that they had done so when they went to ask approval of this compromise they had made. But there is no hint of such a thing having been done by the liquidators, and it is certain that the Court would not have approved of any such proceeding. Apart from the fact that we have written evidence of what was actually disclosed (which I think conclusive as to the extent of the disclosure made), it is to my mind inconceivable that the liquidators should have had the existence of these promissory-notes disclosed to them, and that on the statement that they had been intended as advances towards patrimony they should have left them with Mr Bain as of no value in the liquidation. Those of us who had most to do in connection with the liquidation of the bank are least likely to think that the liquidators could possibly have so acted. And further, it is not, I think, possible that disclosure of the promissory-notes could have been made without some note or memorandum to that effect having appeared among the liquidators' papers. But no such note or memorandum exists, and the liquidator who carried through the compromise with Mr Bain has no recollection of hearing anything about these promissory-notes. He says—"I certainly would have noted them if I had thought they were assets which I ought to deal with." If they were worth £700 there can be no doubt that they were assets which he "ought to deal with." Were they disclosed but represented as of no value? If so, that was a misrepresentation. But I cannot think such a misrepresentation was made. The liquidators would necessarily have made inquiry into the matter had they known of the promissory-notes at all, and it would have appeared at once that they were of the full face value of £700. On the facts as proved, as well as the probabilities of the case, I think the Lord Ordinary's view that there is a presumption of disclosure cannot be sustained.

Another defence set up by the defenders is that the pursuers cannot succeed in their

claim to set aside the discharge, unless they prove that it was obtained through the fraud of Mr Bain, and this, they say, has not been established. The Lord Ordinary has accepted this view, which he regards as settled by the decision in the case of the *Assets Company v. The Liquidators* (10 R. 676). If the view which I have taken of the discharge, namely, that it was conditional on the truth, accuracy, and completeness of Mr Bain's written statement of affairs in fact and not merely in accordance with his belief, then there is plainly no room for this defence. But taking this discharge to be conditional, as the defenders maintain it, is this defence well founded? I do not of course dispute the authority of the case cited for anything that it determines, but the only matter that was there decided was that the *Assets Company* were entitled to delivery of certain books and documents. No doubt there are opinions delivered on this question of fraud, but they are given *obiter* in illustration or support of the correctness of the decision pronounced. Take the opinions, however, as decisive of the question that discharges such as we are here dealing with can only be reduced on the ground of fraud, what in the opinion of the Court was the fraud which would be sufficient to set aside the discharge? This is clearly stated by the Lord President—"It is a discharge which is conditional on the truth of the statement made by the contributory to the liquidators regarding his estate—that is to say, if any part of the statement is designedly false and intentionally misrepresents the state of the contributory's affairs, then the whole discharge is bad." If it is proved, as I think it is, that Mr Bain designedly and intentionally misrepresented the state of his affairs by the concealment or non-disclosure of assets belonging to him and available *pro tanto* for the payment of his debts to the extent of £700, what more is needed to fulfil the condition on which, according to the Lord President, "the whole discharge is bad?" Accordingly I think this defence also fails the defenders. In my opinion, as I have said, it is not necessary for the pursuers to prove more than that the written state of affairs was inaccurate and incomplete in point of fact, but if fraud (as defined by the Lord President) is necessary to the pursuers' success, I think they have established it.

I have now considered the case on its proper merits, but there remain two defences urged by the defenders of a preliminary nature which require consideration. These are (1) the plea of *mora* (which cannot affect the case at all if the absolute, and not merely relative, correctness of the written state of affairs is the correct view to be taken), and (2) the plea of incompetency of the case as directed against the trustees of Mr Bain.

(1) As to *mora*. On this matter many authorities were cited to us, which I am glad to say do not call for any detailed consideration. The decisions upon this question of *mora* and its effects depend so much upon the special facts of each case

that scarcely one can be cited as an exact precedent for another. Our law upon this question, however, is not, I think, open to much or any doubt, and may, I think, be stated in these three propositions—(1) that delay *per se*, so long as it is within the years of prescription, does not bar a pursuer's claim; (2) that to avail a defender anything it must be delay in prosecuting a known claim—that is, a claim known to the pursuer to exist; and (3) that the delay has been prejudicial to the defender in depriving him of evidence which would or might have supported his defence. I think the plea of *mora* cannot be sustained in the present case on the ground of any of these rules—(1) The transaction challenged took place in 1879, and the action was raised in 1901, many years, therefore, within the years of prescription. (2) The pursuers did not know of their right to challenge or to insist on this action for many weeks before the action was raised; there was therefore no delay in prosecuting a known claim. The defenders maintain, however, that the pursuers should or might have known of their right long before they discovered it. That they might have discovered their right sooner may be admitted, for the source from which they derived their information ultimately was open to them. The late Mr Bain died in 1882, and the inventory of his personal estate, from which the pursuers ascertained the concealment, or part of it, which they now allege, was recorded in the Commissary Court Books in the same year. Accordingly, if the pursuers had searched those books shortly after Mr Bain's death they would have found what they now to some extent rely upon. In fact the pursuers, not suspecting the fairness or completeness of Mr Bain's surrender of his estate when the discharge was granted, made no search in the Commissary Court Books, and made no inquiry on the subject until they had discovered that several persons, who had been discharged in the same way as Mr Bain on a supposed complete surrender of their estates, had not so surrendered. This led the pursuers to make the investigation which resulted in their discovery of the facts in regard to Mr Bain, now alleged as the ground of action. But in my opinion the pursuers were under no obligation to make their inquiry sooner than they did. They had no reason to suspect Mr Bain's surrender to be anything other than he had represented it to be—a complete surrender; and they lay under no obligation to test the accuracy of Mr Bain's statements. It had been accepted, on grounds *prima facie* sufficient, by the liquidators of the bank, and subsequent events alone had caused it to be doubted. If, therefore, the pursuers were not bound to suspect Mr Bain's fairness, or to test the accuracy of what they had no reason to doubt, their delay in doing so was not a delay on their part of which the defenders can now take any advantage. The pursuers lost no time in intimating their claim and insisting on it, when the existence of the claim came to their knowledge. (3) Have the defenders suffered any

detriment by the delay, or lost any evidence which would have been available to them had the pursuers' claim been sooner made? I think this question must be negatived. The defenders do not allege anything of the nature of evidence which has been lost to them, although they offer certain vague conjectures on the subject. For example, they say that several intimate friends of the late Mr Bain are now dead who might have been able to say something with regard to the obtaining of the challenged discharge. No such friends saw the liquidator on the subject, and therefore what such friends could have said would only have been what Mr Bain had told them. One such friend—a defender in this case and a nephew of the late Mr Bain—survives and has been examined, and his evidence is to the effect that the late Mr Bain told him that the bank had got every sixpence from him except some money he had "given to his sons a few years ago." It is this money "given to his sons," and which was part of his assets, which forms one ground for now challenging the completeness of his surrender. If other friends had repeated that Mr Bain told them the same story, the defenders would not have been the better of their evidence. If Mr Bain told other friends a different story (which I cannot suppose), then his statements would not have been reliable. But Mr Bain's nearest friends—his two sons—are still surviving and have been examined. They cannot speak to anything done by their father, or said by him, which supports the defence. It is difficult to suppose that more distant relatives or friends could have done so. Another suggestion was that his law-agent was dead. But that agent's son and partner is alive, and on examination says that his father was not consulted by Mr Bain in reference to his surrender and discharge—that that was carried through entirely by Mr Bain himself with the liquidators. Lastly it was suggested that Mr Jamieson, one of the liquidators, now dead, might have been able to say something touching the matter of Mr Bain's surrender, because he had had one meeting with Mr Bain at the time negotiations were going on for the discharge. As the Lord Ordinary seems to have been impressed with this view it is proper to notice it, otherwise I should have dismissed it as another conjecture. It is of some consequence to see what was the subject and purpose of that one meeting with Mr Jamieson. After Mr Bain had given up his state of affairs the liquidators discovered from the books of the bank that on the day before the bank closed its doors Mr Bain had drawn out of his account the sum of £1000. The liquidators thought that in thus withdrawing his money Mr Bain was taking advantage of his knowledge as a bank official of the bank's affairs in an improper way. They accordingly insisted as a necessary part of his proposal for a discharge that he should *ante omnia* restore the £1000. Mr Bain agreed to this, but explained that he had already paid away to sundry creditors somewhere near £400,

and he was offering payment of the remaining £600, which he thought was all he should be asked to return. To this the liquidators would not accede. Now, it was at this stage of the negotiations for a discharge that Mr Bain had a meeting—his only meeting so far as known—with Mr Jamieson. Mr Bain's letter of 6th March 1879—the only thing that shows he ever had a meeting with Mr Jamieson—shows also what the subject of their conversation had been. It referred to this £400 and nothing else. The reference to this meeting with Mr Jamieson and the suggestion that at it Mr Bain may have disclosed all about the promissory-notes for £700, seems to me rather unfortunate for the defenders. If the liquidators were so severe and unbending in dealing with Mr Bain about this £400 which Mr Bain said he had already paid away to a number of trade creditors, how did they become so yielding and indeed so generous as to let him retain £700 which was immediately realisable. But without pressing this further I conclude what I have to say on the defenders' plea that they have been deprived of evidence by the pursuers' delay in bringing their action, by repeating that they have not been able to point to any reliable evidence that has been lost to them, and that their conjectures on the subject when examined only show their improbability.

(2) Has this action been incompetently directed against Mr Bain's trustees? It is said to be so because the trustees were discharged by the beneficiaries in 1888, which it is said brought the trust to an end, and that the trustees, as such, then ceased to exist. Now, in my opinion, the granting of a discharge by beneficiaries does not *per se* bring the trust to an end or deprive the trustees of their character. In nine cases out of ten such a discharge does so practically because it is seldom executed until the whole trust fund has been ingathered and distributed. But it is the fact that the whole trust purposes have been fulfilled, not the act of the beneficiaries, which puts an end to the trust. The trust confers the character and office on his trustees as well as the property which he directs them to administer, and the trustees cannot be deprived of either except by their own act or the act of the law. But that an action is competent against trustees who have been discharged, where its purpose is to constitute a claim against the estate of the trustor, has been in terms decided in the case *Assets Company v. Falla's Trustees*, 22 R. 178. We were asked (being a Court of Seven Judges) to reconsider that decision. I have done so, and see no reason to doubt its soundness. But it is unnecessary to discuss here whether trustees who have been discharged on the fulfilment and termination of the trust can competently thereafter be called as defenders in an action based upon the debt or obligation of the trustor. The trust here has not come to an end. There is estate belonging to the trust still to ingather and distribute. Something like £2000 has still to be got from Potter's Trust

on the death of an annuitant. That £2000 was vested *jure mariti* in the late Mr Bain and was covered by the general conveyance he made in favour of his trustees. They are vested in it now, and no one but these trustees has any right to demand payment of that money when it becomes payable but them; no one can validly give a discharge therefor when paid but them. The trust is therefore still a subsisting trust, and any claim against the trust-estate must be constituted against the trustees. It is to my mind quite clear that any demand against the beneficiaries under Mr Bain's trust would be met and met successfully by the defence that they were not bound to answer any such demand until the claim was constituted against the trustees, and then only after the trust fund in their hands or due to them had been exhausted. This plea therefore in my opinion should be repelled.

I sum up my opinion thus—(1) I think the discharge was conditional on the truth, accuracy, and completeness, in point of fact, of Mr Bain's written state of affairs, and that as it was not so the discharge falls to be reduced. (2) That even if the state of affairs is only required to be true, accurate, and complete to the best of Mr Bain's knowledge and belief, it was not so, and therefore falls to be reduced. (3) That if it is necessary to the pursuers' success to prove fraud in the sense of wilful and intended concealment or non-disclosure of part of his assets on the part of Mr Bain, that has been proved; and (4) That the defences of *mora* and incompetency are not well founded.

On the whole matter I am of opinion that the judgment of the Lord Ordinary should be recalled and decree pronounced in terms of the conclusions of the summons.

LORD MONCREIFF—After a long advising I must apologise for delivering a somewhat long opinion, but the importance of the case I think justifies me in doing so.

This case raises several difficult and important questions which may affect not only the defenders but the representatives of or beneficiaries under the wills of other deceased contributories who were discharged by the liquidators of the City of Glasgow Bank. Except in regard to one or two details which do not affect the result, I agree with Lord Young and the Lord Ordinary, who has twice anxiously considered the case.

Lord Young has referred to and commented upon several passages in the proof and documents which I had intended to note. But it is now unnecessary, because I entirely agree in those comments.

I. The defenders' first objection is that the action is directed against the wrong parties. The summons is directed against William Bain and James Bain, sons of the truster, and another James Bain, a nephew of the truster, who are designed as "the accepting and surviving trustees nominated by William Bain," the truster, by his trust-disposition and settlement. William Bain and James Bain the truster's sons, and also

Lewis Potter Bain, are called as individuals "for any interest they may have in the premises;" but the operative conclusions of the summons are directed solely against the defenders called "as trustees foresaid."

But it appears that the persons who are called as trustees of William Bain are no longer trustees. Their connection with the trust was finally terminated in the year 1888, that is, thirteen years before this action was raised, when they were fully discharged by the whole of the beneficiaries under William Bain's settlement of their whole actings and intromissions, "and also of the said trust-disposition and settlement, and minute of agreement themselves . . . and the said testament testamentar so far as relates to the premises and all that has followed or may be competent to follow thereon." They are now therefore *functi officii*; they could not be compelled to resume the trust, neither have they in my opinion any longer a title to represent the trust in any way. I need only add that as all the beneficiaries concurred in discharging the trustees, there was no necessity for either judicial exoneration or resignation.

The management of the trust having thus lapsed through the retirement and discharge of the trustees, this action is erroneously directed against them. They no longer represent the estate; and the position is just as if they had resigned or died. Now, an action of constitution *cognitionis causa*, which I presume this is intended to be, must be directed against the proper parties, and the proper parties are not here.

But in such a case creditors are not without a remedy. William Bain's trustees only confirmed, ingathered, and paid away the estate which was given up in his inventory in 1882. They did not know that right to the bequest to Mrs Bain under her brother Alexander Potter's will vested *jure mariti* in her husband William Bain. Not even Alexander Potter's trustees knew that; on the death of Alexander Potter's widow in 1886 they paid away the greater part of that bequest, not to William Bain's trustees, but to Mrs Bain, retaining only enough to satisfy an annuity which is still current.

Therefore the matter stands thus—The balance of the estate of William Bain which was confirmed by his trustees was paid by them to the beneficiaries under his will. There is nothing to prevent the pursuers, if they can make good their case, proceeding direct against those beneficiaries to whom those payments were made, who of course will have their defences to any claim which may be made upon them—Stair, iii, 8, 70, and *Stewart's Trustees v. Evans*, 9 Macph. 810, per Lord Cowan, 817-818.

But in regard to that part of William Bain's estate which was not confirmed or intromitted with by his trustees, the pursuers' proper course seems to be to constitute their debts *cognitionis causa* against the next-of-kin of William Bain under the Act 1695, c. 41, and get themselves decerned executors-dative *ad omnia* to him. The

whole law applicable to such a proceeding will be found in the opinions of the Judges in the case of *Smith's Trustees v. Grant and Others*, 24 D. 1142.

It also seems to be competent for them to apply for the appointment of a judicial factor—2 M'Laren on Wills, p. 1272, sec. 2374, and the cases cited in note 9. It is not necessary that I should pursue this matter further, because it will be for the pursuers to decide which course to adopt if they are held to have directed this action against the wrong parties. I agree with the Lord Ordinary and Lord Young and Lord Kinnear that this objection is well founded, and should be sustained. After the full and learned opinions of Lord Young and Lord Kinnear, I need add no more on this head.

II. If I am right in this the defenders should be assiozied from the action as laid.

But as this is not the opinion of the majority of your Lordships in this Court of Seven Judges, it is right that I should express my views on the merits of the case. In the view which I take of the case, the ultimate question of fact is whether when William Bain senior obtained his discharge from the liquidators of the City of Glasgow Bank in 1879, he fraudulently concealed from the liquidators two promissory-notes, one for £500 (upon which £200 had been paid up, and handed to the liquidators) granted to him by his son James Bain on 1st January 1874, and one for £200 granted by his son William Bain in 1877. If I am right in this, the sole ground upon which the pursuers seek to set aside the discharge granted to William Bain and to revive his liability for outstanding calls, which now with interest amount to £63,000, is a debt of £500 which is said to have been fraudulently concealed from the liquidators in 1879. I assume that if the pursuers are correct in their averment that William Bain fraudulently concealed from the liquidators a debt of £500 due to himself, the result in law will be that the discharge must be set aside. But the great disparity between the value of the assets alleged to have been fraudulently concealed, the lapse of time, and the serious consequences which must result if fraud is proved, lay a very heavy burden upon the pursuers if they are bound to establish fraud, to do so by the clearest possible evidence.

William Bain died on 30th November 1882 and an inventory of his estate was recorded on 29th December 1882.

It appears that in the course of investigations into the affairs of deceased contributors who had been discharged by the liquidators, the Assets Company in 1901 (nineteen years after Mr Bain's death) examined the inventory of Mr William Bain's estate. They found from it that the total value given up amounted to £3254, 12s. 11d., and amongst the assets were two promissory-notes, one by the deceased's son James Bain for £500 dated 1st January 1874, upon which £200 had been paid up, and one by another son, William Bain junior, for £200, dated 23rd

May 1877, both dates being prior to the stoppage of the City of Glasgow Bank. They then compared the inventory with the statement of William Bain's effects given up for the purpose of surrender and discharge, and they observed that neither of those promissory-notes, which were current at that time (5th November 1878) was entered in that statement.

I do not stop to inquire how it was that the promissory-notes came to be treated as debts. But I think that it is obvious that it was in order to augment the inadequate fund available for the support of the widow, and that in the end William and James Bain very properly consented to the notes being so treated.

To resume, the pursuers at once assumed that these assets had been fraudulently concealed by William Bain. Not only so, but they assumed that the whole of the means left by William Bain, amounting to £3254, 12s. 11d., were, or were the proceeds of, funds which had been fraudulently concealed by William Bain, and on that footing they raised the present action as will be seen from the open record.

Before the record was closed, however, the pursuers discovered the fact that moveable estate bequeathed by his wife's brother to the extent of £7870, 4s. 8d. had vested in Mr Bain *jure mariti* at the date of the discharge. In Condescendence 4 the pursuers say—"The said William Bain did not disclose his whole assets, but on the contrary fraudulently concealed several important assets belonging to him," in particular the two promissory-notes which I have mentioned, and the moveable estate coming from Mr Potter, and then they add—"In addition to the assets above specified, the said William Bain concealed other assets belonging to him and money in his possession to the extent of at least £3000."

Thus on record the pursuers charge William Bain with having fraudulently concealed assets amounting to £11,370, 4s. 8d. It is now admitted that when he made his declaration and obtained his discharge William Bain did not know, and that he never knew, that he had any personal right to or interest in the money which was coming to his wife from Mr Potter's estate. It is also now admitted that with the exception of the promissory-note for £200, and the balance of the promissory-note for £500, all the property given up in William Bain's inventory was acquired by him subsequently to the date of his discharge. The case is therefore left to depend on the pursuers proving that the two promissory-notes were fraudulently concealed, and as the answer to that question depends on the honesty of William Bain it is not unimportant to observe that the wholesale charges of fraud made against him in regard to at least £10,800 of the money out of £11,300 which he is said to have fraudulently concealed are absolutely without foundation. I shall only add at this stage that in my opinion the question of fraudulent concealment is really confined to the balance, £300, due on the pro-

missory-note granted by James Bain, because if the promissory-note for £200 granted by William Bain junior had stood alone, I do not believe that any Court would have convicted William Bain senior of fraud, notwithstanding the shape of the document which he took as a voucher for the advance which he made to his son William.

It is scarcely necessary to add that this action is not insisted in merely in order to recover the value of the notes with interest. That is not the pursuers' object; it is through the notes to invalidate the whole of the discharge.

I now proceed to consider the various questions which were argued to us.

(1) The contract upon which the discharge followed was admittedly conditional. The question is, what was the condition? Did William Bain warrant the absolute truth of his disclosure, or did he merely declare that the statements were true to the best of his knowledge and belief? So far as I am aware this is the first case in which the Assets Company have maintained and argued this plea. At least in all the cases, including the present, they have averred fraud on record. If they are right in their contention the logical result is that, however innocent or excusable an omission may have been, and however small the sum omitted, a discharge if challenged at any time short of forty years will with all that has followed upon it be swept away. Now, even a comparatively poor man if suddenly called on for a complete statement of his means, might be excused for omitting some small asset. He may have mislaid and forgotten some stock or share certificate of small value; or he may years before have advanced £50 to a friend or relative, and although he never intended to demand payment he may have taken and forgotten the existence of an IOU. Yet the pursuers say that such an omission discovered twenty years afterwards would be fatal to the discharge. For instance, if in the present case William Bain instead of preserving the note for £200 granted by his son William had lost it and forgotten about it, and in 1901 the note had been discovered and brought to the knowledge of the pursuers, the pursuers would have maintained that the discharge must be reduced. In the case which I have supposed, the creditor at one time knew of the existence of the note, but the pursuers say that the result would have been exactly the same if the property to which the contributory was entitled, and which he did not disclose, was property of which at the date of his discharge he knew nothing, as, for instance, the Potter succession in the present case.

I do not doubt that if parties to a contract think fit to make it a condition of the contract that the statements made by one of the parties must be absolutely true, such a contract will receive effect according to its letter. But before that result can be reached it must be demonstrated that both parties intended that the absolute truth of the statement should be a

condition of the contract; and in judging of that matter it is essential to consider the document or documents which form the contract, and in the second place the subject-matter of the contract and warranty. Now, in the present case the liquidators were anxious to wind up the liquidation expeditiously, and to avoid having to sequestrate contributories who were unable to pay calls. The proposal for compromise accordingly came from them. The questions and the declaration and the discharge were framed by them, and must be construed *contra proferentes*. In regard to the terms of these documents, I will only say that the contributory might be well excused for supposing that all he was required to do was to make a full disclosure according to the best of his knowledge and belief. These words are to be found in that most important question No. 2, and in the equally important declaration; and the discharge itself proceeds on the narrative of the answers given to the questions and the declaration. In my opinion the questions and answers and the declaration are imported into the discharge, and the pursuers are not entitled to exclude consideration of their terms, and construe the words "truth, accuracy, and completeness" without reference to them. It is also to be observed that equally with the questions and declaration, the condition on which the pursuers found is also introduced *narrativè*. It is not a new and independent condition. It is merely a repetition of the third condition prefixed to the questions put to contributories.

The defenders' construction is confirmed in the strongest manner by the opinions of the Judges in the case in 10 R. p. 676, the Judges under whose supervision the liquidation was carried through, and the compromises approved and the discharges granted. That case is the sheet anchor of the pursuers, and they ought to accept the decision with its qualifications. It is quite plain that all the Judges intended to impress upon the Assets Company that in their opinion compromises with contributories should not be called in question, except on the ground of fraud, this being the general rule of our law in regard to transactions—Stair, iii, 8, 70, and iv, 40, 33. These opinions, which were given with great fulness and clearness, were *obiter* in this sense, that this question did not precisely arise for decision. But something must have occurred in the course of the argument (which is imperfectly reported) to lead to such an emphatic warning being given. The result has been that, so far as I know, this is the first case in which that point has been seriously put forward. I think the plea is ill-founded, and should be repelled.

The pursuers rely chiefly upon Insurance cases, such as *Standard Life Assurance Company v. Weems*, 11 R. (H. of L.) 48. I do not think that these cases can be safely followed as analogies. They turn upon the terms of the conditions and the settled practice in insurance law. There is no doubt that for a very long time insurance

companies have avowedly transacted business on the footing that an untrue answer to a material question should void the policy.

Lord Selborne says in *Weems'* case "it became usual, I do not know when, but at least for the last fifty years, to insert a term in the contract that if the statements were untrue premiums should be forfeited."

Accordingly, both in the declaration which *Weems* signed and in the question to which he was held to have returned an untrue answer, there is no reference to the statements and answers being made to the best of the knowledge and belief of the applicant. The question which *Weems* was held to have answered untruly was *factum proprium* and essential to the contract. It was whether he had always been strictly temperate. The answer was "Yes," and yet within a very short time he died of chronic hepatitis, a disease of the liver produced by excessive drinking over a considerable period.

Now, in the present case, as I have pointed out, the material question (2) is, "What property do you possess, and what is its nature and value to the best of your knowledge and belief?" And in the declaration framed by the pursuers these words are introduced that the answers "are true and correct answers to the printed queries affixed hereto to the best of my knowledge and belief?"—words which do not appear in the statutory declaration, and which do not appear in the declaration which insurance companies usually take from the assured. I repeat that *Bain* was entitled to suppose and intended that in making those answers and that declaration he was doing no more than stating the amount of his means to the best of his knowledge and belief.

2. There is not much doubt as to the general law on the question of *mora*. Mere lapse of time, short of the long prescription of forty years, coupled with taciturnity, will not in general afford a defence to a claim by one who holds a liquid document of debt, or has otherwise constituted his claim. There are many decisions, some involving great hardship, which establish this, but these are cases in which the creditors' debt was constituted.

But there may be cases in which the defence of *mora* and taciturnity will be sustained if it is shown that the creditors' delay has caused substantial prejudice to the other party; this especially holds if the claim requires constitution.

A creditor who holds a document of debt, &c., may in general lie by and give no sign, even for thirty-nine years; there are such cases in the books. The debtor is presumed to know that the debt is not discharged.

But a debtor whose debt is discharged is not bound to anticipate that he will be charged with fraud; and so may lose or destroy evidence which would disprove such a charge.

It may be that if the fraud averred does not admit of dispute, and the creditor can show that it was through no fault of his own that he did not discover it sooner, the lapse of time will not prevent him from

establishing his right. But the first question is whether there was fraud or not? It is for the creditor to prove fraud; and if the fraud alleged is not admitted by the debtor's representative who is sued, or is not beyond dispute, and the person sued is able to show that owing to the lapse of time he has been deprived of all evidence necessary for his defence, and that therefore it cannot be satisfactorily decided whether there was fraud or not, there is much force in the contention that it would be inequitable to compel a defender to go to proof in such circumstances; and that material evidence having been lost (I assume through the fault of neither party), the loss should lie where it falls and the discharge stand.

Even if it must be shown that the creditor knew or was bound to know of his right, it seems to me that the circumstances of the present case satisfy all the requirements of a successful plea of *mora* and taciturnity. On the question of prejudice I refer to and adopt the statement of the Lord Ordinary, of facts going to constitute prejudice, given in his note to his interlocutor on 22nd February 1902:—

"It will thus be seen (1) that the pursuers' action was brought twenty-two years after the date of the transaction challenged; (2) that it was brought twenty years after *Mr Bain's* death, and after the particulars of the estate left by him had been disclosed by his inventory; (3) that it was brought thirteen years after *Mrs Bain's* death, and after the disclosure in her inventory of her interest in *Mr Potter's* estate; (4) that this last matter was only, as I have said, brought up at the adjustment of the record, and after it had been apparently found impossible to meet the defenders' explanations as to the other part of the case.

"Now, such being the circumstances in which the pursuers came into Court, what is the position in which the action finds the defenders? Taking (as of course at this stage I must) the pursuers' statements and the documents which they produce or admit, the following facts amongst others stand out:—

"1. *Mr Bain* is dead. His wife is dead. Of the four liquidators, three are dead. Of the four judges who sanctioned the discharge, three are dead. Had the pursuers postponed their action for a few years longer there would probably be no person living who knew anything of the facts. As it is, the defenders say that *Mr Bain's* private papers have not been preserved, and that the friends whom he consulted at the time are now dead; and this seems at least highly probable. In any case loss of evidence is to some extent certain, and how far that loss extends and with what result no one can tell.

"2. Further, *Mr Bain's* estate has for many years been wound up and divided among the beneficiaries. So also has *Mrs Bain's* estate, including in that estate the proceeds of the alleged reversionary interest. Of the beneficiaries amongst whom the two estates have been divided, some, at all events, are out of the jurisdiction. And



how far the amounts paid to them can be recovered, or how far some of them may have the benefit of prescriptions shorter than ours, cannot be known. In any case, money must have been spent which would not have been spent. Engagements must have been made which would not have been made. One family agreement in particular, involving the expenditure of about £1000, is mentioned on record and is not disputed. New interests in many ways must have arisen. In short, matters are not and cannot be now entire."

Assuming that it must be shown that the creditor knew of his right, or at least that he was bound to inform himself, while I do not think it is shown that the Assets Company knew about the promissory notes until 1901, I am of opinion that they might have informed themselves of that matter in 1883, and that they were bound to do so at that time or shortly thereafter.

This touches an important question as to the pursuers' right to challenge such discharges under their Act. There is no such plea in the defences. The defenders, after this case had been sent to this Court of Seven Judges, asked leave to add a plea to title. Leave was refused; but I should like to say that, speaking for myself, my reason for concurring with the rest of the Court was not that a plea to title might not be added at any stage of the process on terms, but that the pursuers' title was not a matter upon which we desired to consult our brethren. My own feeling as to the merits of such a plea is, that looking to the decision in *The City of Glasgow Bank v. Assets Company*, 10 R. 676, and subsequent cases in both Divisions which have followed upon it, it is too late in this Court to question the pursuers' title. I do not feel called on to say more on this point at present.

If, however, right to challenge and reduce compromises is to be considered an asset transferred to the Assets Company (for which by the way nothing was paid), it is an asset of a very peculiar and anomalous character. It is not a constituted debt, and it is not an asset which required nursing. On the contrary, it is a right which, if to be enforced at all, should in common fairness to the discharged contributories and their representatives be exercised at the earliest possible opportunity. Now, in the present case that opportunity arose in 1883, when it was published to all the world that part of William Bain's estate consisted of promissory notes which were in existence when he made his surrender and obtained his discharge, but which did not appear in the statement of his property surrendered at that date.

I am therefore of opinion that the pursuers had a duty to investigate this case at that stage, and the duty was all the clearer if, as I hold, they required to establish fraud in order to get behind the discharge. As the Lord Ordinary says—"But it appears to me that a reduction on the ground of fraud is pre-eminently the kind of action which ought to be brought time-

ously, and if not brought timeously, ought not to be entertained."

Therefore on the ground of *mora* and taciturnity I think the defenders should be assoziated.

3. It remains to consider the serious question whether if the pursuers are bound to establish fraud they have succeeded in doing so. I think it has been lost sight of that the condition of this part of the argument is that there may have been omissions not fraudulent, and therefore not fatal to the discharge. The proof has added nothing to the pursuers' case. It remains, as it was before, rested on the bare fact of the possession by William Bain in 1879 of two documents of debt which are not included in the statement of his property surrendered. Again, it adds little to the defenders' case, for the simple reason that almost the only evidence which would have been of value has been lost through death and delay.

I attach the less importance to the defence of *mora* as a substantive defence, because even although the defence of *mora* may not be sustained to the effect of excluding the action, the considerations which support it apply with great force to this branch of the case. The strength of the defence is that this is a stale claim. The agreement between the liquidators and Bain was a compromise or transaction, which in our law cannot be impugned except on the head of fraud. As I have shown, the only items which the pursuers now maintain that William Bain fraudulently concealed are the promissory notes, one for £200 granted by his son William Bain junior in 1877, and the other for £500 granted by his son James Bain in 1874, of which, however, £200 was paid up and handed to the liquidators in 1879.

The pursuers' case upon this point is extremely simple—"William Bain" (they say), "a man of business, advances money and takes a document of debt, and stipulates for and draws interest upon it for several years. While professing to make a complete surrender of his estate to the liquidators, he omits that asset from his sworn statement, and continues to draw interest upon it until his death. What further proof of fraudulent concealment is required?"

My first comment on this way of stating the case is that on its face it is too simple. There must, it strikes one, be some explanation, whether entirely satisfactory or not, how it came that this man of business, who well knew what would be the consequences of concealing even a paltry sum, did not give up these promissory notes, and thus, if the concealment was fraudulent, imperilled the discharge, and all the money which he might thereafter earn or succeed to. The answer to the question depends in a great measure upon perspective, and the point of view. The pursuers, ignoring altogether the lapse of time and the peculiar nature of the assets, desire that we should consider it as if the challenge had been made in 1883, and as if the scanty evidence which we have before us were all

that the defenders could have then adduced.

But in 1883 Mr More and Mr Jamieson were alive and could have been examined; and Mr Haldane's recollection would have been fresh. Their evidence would have been conclusive on the question of disclosure. Again, most of William Bain's intimate friends were then alive; in particular, his agent, Mr Galletly, who must have been familiar with Mr Bain's private affairs, and who was also necessarily aware of the terms and conditions of the surrenders, as he himself was a contributory who surrendered. His evidence would have been material.

We are, therefore, owing to the pursuers' delay, driven to decide the question in great measure on conjecture; and everything should be presumed in favour of the honesty of William Bain. My view, stated shortly, is this—I think that, whatever were the grounds of his belief, William Bain himself did not consider these notes in the light of ordinary debts or assets. In the case of his son William, he clearly showed this by simply treating the document as a voucher for an advance of patrimony. The other note was not quite in the same position, because he stipulated for, and regularly received interest upon it, his reasons for doing so, no doubt, being that the sum was larger, and his son James Bain able to pay interest. But he never intended to demand repayment, and *both* notes were found put up with his will.

If he intended to defraud the bank by concealing the existence of the note for £500, he showed himself to be not only a knave but a fool, because he left the note in his repositories with all the markings of interest upon it to brand him as a swindler when it came to be published in his inventory. If he did not disclose the existence of this note to the liquidators, I think he was wrong; it was a matter which should have been mentioned, though not necessarily included in his statement. But what we have to decide is not whether he acted properly or improperly, but whether he acted fraudulently. Now, in addition to the extreme improbability that if he was consciously guilty of concealment he would have left the note to expose his fraud, such fragments of evidence as remain all go to show that, rightly or wrongly, he believed that he had a right to retain the notes; he regarded them as vouchers for advances against patrimony. For instance, when under pressure he had to pay the liquidators an additional £400 he applied to his son James Bain, not as a creditor would apply to a debtor, but apologetically asking him whether he could have back £200 of the £500 he had advanced.

Further, I am particularly struck with a letter written by William Bain within three weeks of his death on 10th November 1882. It seems that his sons James and William Bain, in order to assist their father, had without telling him paid the rent of his house. William Bain having got the receipt for his rent, wrote that letter, the whole of which is worthy of

attention. At that time at least William Bain had no purpose to serve in affecting a false view of the relations between himself and his sons. According to the pursuers he was then the sons' creditor for £500, and yet he writes such words as those—"In the first place, I must say it is very kind of you, and more than ever I could have thought your doing for me, but at the same time, and as I said to you when the subject was discussed before, if I could live and pay the rent out of what I have, it is not fair to take it from you or any friend I have." I cannot reconcile such words with conscious fraud on the part of William Bain.

If the matter had rested there we should have had to decide whether William Bain acted fraudulently in not disclosing to the liquidators the existence of this promissory-note, on the assumption of course that he did not disclose it. The question, I must repeat, is not whether on that assumption he acted improperly, but whether he acted fraudulently. The case on the side of the pursuers is distinct enough, viz., that he took a document of debt and regularly drew interest upon it. But there is another side to the question, viz., that William Bain having made advances to two of his sons of unequal amounts, intending that they should not be repaid, but simply deducted from the respective shares of patrimony falling to the sons, he, in order to equalise the shares of his children, made the son who received the larger sum pay interest upon it, while no interest was charged or paid on the smaller sum which was advanced to the other son.

In regard to the payment of interest on the £300 note after the surrender, I attach little importance to it, because there is no evidence that William Bain demanded it, and I cannot doubt that his son would have insisted on paying it whether his father demanded it or not. In the eye of the law both advances might be regarded in bankruptcy as debts; upon that I express no opinion. But when the question is whether a father acting in that manner was guilty of fraud in not treating such advances as ordinary debts, I am not prepared to affirm that such conduct was fraudulent.

It is not necessary, however, to rest the defence entirely on that ground, because Bain's conduct in regard to these promissory-notes indicates, I think, that he had some assurance which fortified his own honest and not unnatural view of his right to retain the notes. I do not think that the pursuers have proved that the existence of the notes and William Bain's views as to their character were not disclosed to the liquidators or one of them. On the contrary, I think it is probable that they were disclosed. Apart from anything that William Bain may have said to Mr Haldane or Mr More, we know that he had an important interview with Mr Jamieson in the beginning of March 1879. William Bain had withdrawn £1000 from the bank the day before it stopped payment, and

had used about £400 of that sum in paying small accounts. £600 remained, which he at once gave up to the liquidators. The liquidators told him that he must restore the £400 which he had paid away. I do not question the propriety of the attitude adopted by the liquidators, but so much is clear that if they had sequestrated William Bain they could not have recovered the money so paid away.

At the interview with Mr Jamieson the latter no doubt asked William Bain whether he could not find that £400, and I think it is not improbable that Bain then told him that (as William Bain junior was unable to pay) the only source from which he could get it was from his son James Bain to whom he made an advance of which he had never intended to demand repayment; and that Mr Jamieson then told him that if he could furnish the £400 (which as I have said the liquidators could not have recovered in a sequestration) they would be satisfied.

This, of course, is conjecture; but from loss of evidence we are practically shut up to conjecture. At the same time from what we know of the wide discretion with which the liquidators were entrusted in settling with contributories the conjecture is not improbable.

The objects of these compromises were, on the one hand, to enable the liquidators to bring the liquidation to a speedy conclusion, and on the other to give the contributory a fresh start in life. Prompt settlement and finality were what was aimed at. The liquidators did not desire to take over unrealisable assets or irrecoverable debts such as William Bain junior's promissory-note. Moreover, we see from one of the questions (No. 8) put to contributories that the liquidators were ready, and considered themselves entitled (subject always to the control of the Court with whom they were constantly in communication), to take into consideration the circumstances of the surrendering contributory's family and dependents. And the reason why they resisted the transfer to the Assets Company of papers relating to surrenders no doubt was that they feared that a limited company uncontrolled by the Court would seek to set aside these transactions which they had carried through with so much trouble and so much pain, on grounds which they would not have put forward, and at a time when explanations of their reasons for accepting the surrenders could no longer be given. This case shows that their apprehensions were not unfounded. In these circumstances I am not prepared to find that the pursuers have established fraud on the part of William Bain.

On 28th May, when the case was put out in Single Bills to sign interlocutor, counsel for the defenders renewed their motion for leave to amend the record by adding a plea of "no title to sue," but did not desire to insist in the motion unless it could be granted without any conditions as to expenses.

The Court refused the motion and pronounced the following interlocutor:—

"The Lords of this Division, along with the three consulted Judges of the First Division, having heard counsel for the parties on the reclaiming-note for the pursuers against the interlocutor of Lord Kyllachy, dated 13th June 1903, in conformity with the opinions of the majority of the said Judges, recal the said interlocutor reclaimed against: Reduce, decern, and declare in terms of the reductive conclusions of the summons: Find the compearing defenders jointly and severally liable to the pursuers in expenses of process; allow an account of said expenses to be lodged, and remit the same to the Auditor to tax and to report: *Quoad ultra* remit to the said Lord Ordinary to proceed with the cause, and with power to him to decern for the said expenses when taxed."

Counsel for the Pursuers and Reclaimers—Salvesen, K.C.—Clyde K.C.—Leadbetter. Agents—J. & D. Smith Clark, W.S.

Counsel for the Defenders and Respondents, William Bain's Trustees—Tait—Wark. Agents—J. & J. Galletly, S.S.C.

Counsel for the Defender and Respondent William Bain—Ure, K.C.—Cooper—Tait. Agents—Davidson & Syme, W.S.

Saturday, May 28.\*

## SECOND DIVISION.

(With the Lord President, Lord Adam, and Lord Kinnear.)

[Lord Kyllachy, Ordinary.]

### ASSETS COMPANY LIMITED v. PHILLIPS' TRUSTEES.

*Title to Sue—Assignment of Assets—Statute—Construction—Right to Challenge—Discharge Granted before Assignment—Claim of Damages—City of Glasgow Bank Liquidation Act 1882 (45 and 46 Vict. cap. cliv).*

In 1882 the Assets Company, Limited, under a private Act of Parliament, took over the whole assets and property of whatever nature and wheresoever situated, including all rights, claims, and privileges of every description to which the City of Glasgow Bank, which had gone into liquidation in 1878, or anyone on their behalf, then had right. Assets were defined to mean "all lands and heritages, debts, bonds, mortgages, securities, moneys, effects, choses in action, claims and demands whatsoever, including claims for unpaid calls, and in general all property, real or personal, heritable or moveable, whether situate in the United Kingdom or elsewhere, belonging to or vested in the bank or liquidators or which the bank has power to acquire." It was provided that all

\* The Interlocutor is dated 18th March.