

but is the standing joint-committee specially constituted, not merely for police purposes, but for other purposes which are in the view of the Act of very high importance. The standing joint-committee has the very responsible duty of determining whether works involving capital expenditure which have been decided upon by the county council shall be authorised, and they have also the power of determining whether the borrowing powers of the county council shall or shall not be exercised. But then it seems to me that here again the phraseology of the statute clears the difficulty which is thus created. It is quite clear that it would be an anomaly, if not an impossibility, to hold that under the treaty of consolidation relating solely to police, there should be seated on the standing joint-committee for all purposes these three gentlemen from the burgh, with power to interfere with matters with which they have no concern whatever—whether works of capital expenditure, not within but outside the burgh, and in the county, should be authorised, and whether the county is to be burdened with loans. As I have said, the section clears that, I think, in a very distinct way. It does not say that the standing joint-committee shall be for all purposes a police committee; that would be preposterous—that it should be deemed to be the police committee when sitting to consider whether a loan should be authorised. The true reading is, that as it is intended to vest this body with the powers given to the police committee under the Act of 1857, for the effectuation of these powers it shall be deemed to be the police committee under the Act of 1857. Not that it is, but that it shall be deemed to be the police committee to execute police functions. Now, when we have that before us, it becomes plain that the power which the Town Council now have is not to introduce people to sit upon the standing joint-committee in its general functions, but to place them on it when executing its police duties—that, in short, the standing joint-committee is, to use an intelligible phrase, in police business the acting police committee—and then these gentlemen come into their proper place. Now, that is exactly what this agreement has done, and I think the agreement is very well framed, because it expresses what I think would have been implied by law in an agreement which lacked that expression. It says that they shall not be entitled to vote or act on any matters or things under the clauses relating to capital expenditure. I agree with the criticism which was made by Mr Campbell in opening, that the draftsman had better have gone on to have referred to borrowing, but I make bold to say that the law would do what the draftsman omitted to express, that these gentlemen would have no right under this agreement to sit on questions relating to the authorisation of loans. Therefore I am in favour of answering the first query in the affirmative. As regards the second, the process of reasoning by which I arrive at that affirmative answer

of the first compels me to limit my affirmation of the second to the second alternative, because, holding as I do that these gentlemen are not introduced into the general business of the Standing Joint-Committee, I must go further and say that when the Standing Joint-Committee meets for its general affairs they have no place, and as one of the first duties is to elect a chairman, and that is not specifically a police matter, as that is a power which they exercise, not under the Act of 1857, but under the Act of 1889, sec. 18, sub-sec. 2, the burgh members have no right to interfere. But it is consistent with that that I should hold that if the chairman of the Standing Joint-Committee should be absent when police business is being transacted, the burgh members have a perfect right to take part in the appointment of a chairman for the day, that being part of the business before the police committee.

These are my views upon this matter, and I should propose to your Lordships to give judgment accordingly.

LORD M'LAREN and LORD KINNEAR concurred.

LORD ADAM was absent.

The Court answered the first question in the affirmative, and affirmed the second alternative of the second question.

Counsel for the First Parties—Ure—W. Campbell. Agents—John C. Brodie & Sons, W.S.

Counsel for the Second Parties—Asher, Q.C.—C. D. Murray. Agents—Boyd, Jame-son, & Kelly, W.S.

Tuesday, February 23.

SECOND DIVISION.

[Lord Kincairney, Ordinary.]

MACFARLANE v. MACFARLANE'S TRUSTEES.

Agent and Client—Settled Account—Trustee and Beneficiary—Law Agent's Account—Right of Beneficiary to Insist on Taxation of Business Account of Trust after Discharge.

The doctrine of settled account does not apply between trustees and a beneficiary, so as to prevent the latter, after he has discharged the trustees and their law-agent, from insisting upon taxation of the agent's business accounts, and this may competently be done in an action by him against the trustees for count and reckoning without reduction of the discharge.

This was an action at the instance of David M'Farlane, boilermaker, Dundee, against the testamentary trustees of his late father, concluding for reduction of a discharge dated 1st October 1895, whereby the pursuer had discharged the trustees of their actings and intromissions in

connection with his father's estate, and further, and whether decree of reduction should be pronounced or not, for an account of their intromissions, and for payment of £100 or such other sum as should appear to be the balance of their intromissions, or failing production of an account, for payment of £100.

The question at this stage of the case was whether the pursuer, upon an allegation that since signing the discharge he had discovered that the trustees' law agent's account was grossly overcharged, and had not been taxed, was entitled to have an order for production of the trustees' accounts without first reducing the discharge.

The pursuer averred that as one of the children of the late George Macfarlane, Coupar-Angus, he was entitled to one-eighth of his father's estate. He further averred—" (Cond. 2) In or about the end of September 1895 Mr George Haggart, solicitor, Dundee, who acted as solicitor and law-agent to the trust, on the instructions of the defenders wrote to the pursuer requesting a meeting the following day. The pursuer accordingly called on Mr Haggart, who said he desired him to sign a document for his share of his father's estate. The trust law-agent read over a deed purporting to be a discharge in favour of the trustees by the pursuer of his share in his father's estate, and having appended thereto an abstract of the trustees' intromissions and scheme of division of the pursuer's share of the said estate. (Cond. 3) The said discharge was hurriedly read over to the pursuer, but no explanations were given as to its contents. The appended abstract of accounts was not read over or in any way explained to him, and no opportunity was given him of examining it. The pursuer expressed surprise at the small balance which he was informed was due to him, but the law-agent assured him that the accounts had been correctly made out and that everything was in order, and that by no possibility could the pursuer get any more out of the trust. The pursuer thereupon, relying upon the statement of the law-agent, and relying upon the defenders having done their duty as trustees in their examination and auditing of the accounts incurred to the said law-agent in the management of the trust-estate, signed the discharge. (Cond. 4) In January 1896 the pursuer's brother George, after considerable difficulty, obtained from Mr Haggart a copy of the account of intromissions and showed it to the pursuer, who then ascertained that there were items unwarrantably debited to the funds of the said trust-estate. In particular, a commission fee of £300 has been charged by the said defenders' law-agent for realisation of the said trust-estate, in addition to business accounts amounting to about £150. These sums are grossly excessive, and out of all proportion to the work done by the said law-agent. (Cond. 5) When the pursuer observed the said charges he consulted a law-agent, who at once wrote to the trustees to ascertain whether the accounts and

commission had been taxed. On finding out that this had not been done, the pursuer, through his law-agent, wrote to the trustees calling upon them to have the said accounts and commission taxed by the Auditor, or if they declined to do so, to allow him the use of their instance for that purpose, and at the same time he offered to free and relieve them of all expenses incurred by them. The trustees have declined to agree to either course, and accordingly the present action has been rendered necessary. The defenders failed in their duty to the beneficiaries in not having the said accounts and commission audited and taxed, and are liable to them for payment of said accounts and commission so far as overcharged. The pursuer avers that there will be taxed off the said accounts and commission at least the sum of £250."

The defenders averred—" Denied that the charges were in any way excessive. The trustees had examined and approved of the accounts, and there was no duty on them to have these audited, in view of the fact that the pursuer made no objection to them, and did not demand that they should be audited, and in view of the fact that all the other beneficiaries were satisfied and are satisfied with the same. The pursuer alone of the beneficiaries has raised the present action. Admitted that the defenders decline to open up the matter now. The trust has been wound up."

The pursuer pleaded—" (1) The pursuer having signed the said pretended discharge, relying upon the defenders having examined and audited the accounts of the law-agent, which they failed to do, is entitled to decree of reduction as concluded for. (2) The pursuer, as a beneficiary under the said trust, is entitled to call upon the defenders to have the said accounts and commission taxed, and for a count and reckoning as concluded for. (3) The defenders having made payment of said accounts and commission, without taxation thereof, are liable to the beneficiaries so far as the same are excessively charged."

The defenders pleaded, *inter alia*—" (1) The pursuer's averments are irrelevant and insufficient to support the conclusions of the summons. (2) The pursuer having granted the said discharge in full knowledge of the facts, and after having had the trustees' accounts under his notice, with time and opportunity to consider the same, the defenders ought to be assolized, with expenses. (4) The accounts of defenders' intromissions, and the charges therein, being regular and proper, the defenders are entitled to absolvitor, with expenses."

The Lord Ordinary (Low), by interlocutor dated 16th July 1896, appointed the defenders to satisfy the production. This was done, and by interlocutor dated 22nd October the Lord Ordinary held the production as satisfied, and held the defences as defences on the merits.

By the discharge in question the pursuer, on the narrative, *inter alia*, that the

trustees had made up an account of their intromissions with a scheme of division annexed thereto, which scheme of division showed that the total amount of the residue available for division was £5679, 2s. 11d., and that his one-eighth thereof was £709, 17s. 10d., and farther that he had received advances to account of his share amounting to £208, 10s. 6d., leaving £501, 7s. 4d. still payable, and that the trustees by their law-agent had paid him the said sum of £501, 7s. 4d., and acknowledged receipt of the sum of £709, 17s. 10d. The discharge proceeded—"Therefore I, the said David Macfarlane, do hereby discharge the said [then followed the names of the trustees], as trustees and executors aforesaid, their said agent, and the trust-estate under their charge, of all claims which I had, have, or could competently make under the said trust-disposition and settlement . . . in any manner of way, and I, the said David Macfarlane, bind and oblige myself, my heirs and successors, to free and relieve the said trustees and executors, the trust-estate under their charge, and all concerned, of and from all claims which might in future be made against them as trustees and executors aforesaid and the said trust-estate by any person or persons whatsoever, and I warrant this acknowledgment and discharge to be good, valid, and effectual at all hands and against all mortals."

From an abstract appended to the discharge it appeared that the amount of the charge in the trustees' account was £6407, 12s. 2d., and the amount of the discharge was £728, 9s. 3d., leaving £5679, 2s. 11d. available for division.

The "Table of Fees for Conveyancing and General Business" provides as follows—"XVII. Commissions on purchase or sale of heritable or other subjects, and on money transactions (*d*) realising capital of trust or executory estates, and paying or transferring it to the beneficiaries. *Charge* . . .—*b* book debts and miscellaneous property, 2 to 5 per cent., *c* stocks, notes, and bonds, $\frac{1}{2}$ to $\frac{1}{4}$ per cent., *d* money uplifted from bank, $\frac{1}{4}$ per cent."

The Lord Ordinary (KINCAIRNEY), by interlocutor dated 27th January 1897, after hearing parties in the Procedure Roll, before further answer, and under reservation of the defenders' pleas, appointed the defenders to lodge an account of their intromissions, and that within a week; and allowed the pursuer to lodge objections thereto, if so advised, within six days thereafter; and by interlocutor dated 2nd February granted leave to reclaim.

The defenders reclaimed, and argued—The pursuer was not entitled to have an accounting until the discharge had been set aside by reduction—see *Macpherson v. Macpherson*, July 16, 1841, 3 D. 1242, per L. J. C. Boyle at page 1260. He had not a relevant case for the reduction of the discharge. His averments in article 3 of his condescendence were only relevant upon the assumption that trustees were bound to have their law-agents' account taxed even if no such taxation was demanded by any

beneficiary. That assumption was not well founded, trustees being under no such absolute obligation as to taxation. But even assuming that the pursuer's averments, if proved, would entitle him to reduction of the discharge, the proper course was to have a proof of these averments before the trustees were ordained to account. The cases relied on by the pursuer were not in point. In *Cockburn v. Clark*, March 3, 1885, 12 R. 707, there was no formal discharge as there was here. In no case had it been held that, where there was a formal discharge an accounting could be entered into without first setting the discharge aside by reduction. It was significant here that only one out of eight beneficiaries was taking action.

Argued for the pursuer and respondent—The Lord Ordinary's interlocutor was right. The pursuer was not proposing to go into the whole of the trustees' intromissions. His only objection was to the amount of the law-agent's account, which was grossly overcharged, and had not been taxed. The commission of £300 for realisation of the estate was plainly excessive. [LORD YOUNG referred to the Table of Fees for Conveyancing and General Business, XVII. (*d*), *b*, *c*, and *d*.] The table showed that the pursuer's objection was *prima facie* well founded. Reduction was not necessary to entitle the pursuer to an accounting as regards the items complained of. The doctrine of settled account did not apply to questions between agent and client where the agent had taken credit for the amount of an untaxed account—*Cockburn v. Clark, cit.* There was no distinction as regards this question between a settled account and a formal discharge, and this was practically a question between agent and client, for it was the beneficiaries who had ultimately to pay the law-agent. The title of a beneficiary to raise objections to the account of the trustees' law agent when the trustees had failed to have the account taxed, and declined to take any steps to rectify their omission, had been sustained in *Clyne's Trustees v. Clyne*, June 17, 1848, 10 D. 1325, and *Macdonald v. Macdonald*, February 22, 1856, 18 D. 630. If it were held necessary to reduce the discharge, the pursuer's averments were relevant. It was the duty of the trustees to have the law-agent's account taxed—*Clyne's Trustees v. Clyne cit.*—and the beneficiary was entitled to rely on their having done their duty. The case of *Macpherson v. Macpherson, cit.* was not in point, for in that case there had been a long lapse of time before the objections were stated, and also a decree-arbitral and a decree in a multiplepounding. The pursuer has had the approval of four out of the eight beneficiaries, although he was suing alone.

At advising—

LORD JUSTICE-CLERK—This is a peculiar case. The facts, so far as not in dispute, are that when the time came for dividing this estate a discharge was presented to each of the beneficiaries discharging not only the trustees but also the law-agent.

This was a very unusual course in such a case. The pursuer signed a discharge in these terms. Now he comes forward to impugn the trustees' accounts, but on one ground only, and that is, that the trustees have never done what was their duty, viz., to have the law-agent's account taxed, in order that it might be ascertained that they had not been overcharged. It does appear *prima facie* that the account was overcharged. All that the pursuer desires is to have it ascertained whether the law-agent is entitled to as much as he has taken credit for in the account as his own remuneration. That is a matter certainly different altogether from the trustees' own intrusions. If the law-agent has overcharged his account, or if the trustees have carelessly allowed him to do so, it cannot be maintained that the beneficiary is not entitled to redress in one form or other. Perhaps it would have been better to raise this action as primarily an accounting, with the reductive conclusions merely ancillary. But what is really the essence of this case is the question whether these charges made by the law-agent are defensible or not. I think the course taken by the Lord Ordinary is well adapted to the purpose of ascertaining what is the proper answer to that question, and I am therefore of opinion that his interlocutor is right, and ought to be affirmed.

LORD YOUNG—I can see no objection to the reductive conclusions coming first in the summons. It is immaterial whether they come first or last. So far as the reduction is concerned, it has been disposed of up to the point of considering the case on the merits. The production has been satisfied, and the defences held as defences on the merits.

It was explained that the pursuer is one of eight beneficiaries. After he had signed the discharge in the law-agent's office, his brother obtained a copy of the account. [*His Lordship then read article 4 of the condescence.*] If these charges are true, if it is the case that these sums are grossly excessive for the work done by the law-agent, then nothing has occurred, so far as we are informed, to prevent the trustees having them reduced, and any excess of payment returned to the trust estate. If this be so, then I think it is their duty to have the overcharges rectified and overpayments returned. The only purpose of this action is to have these excessive charges rectified. The trustees are not barred from having that done. Why they should not do it I do not understand. The question is whether the beneficiaries are precluded by the discharges from having these excessive charges (assuming them to be so) put right, and requiring the trustees to take action to that end. The law-agent wrote to these beneficiaries and got them to come individually and separately to his office, and there, at a private meeting he took from each a discharge in the terms of that by the pursuer. Such a proceeding constitutes no obstacle to the law-agent's charges being reduced if excessive. It is

not necessary to have the discharges formally set aside. They certainly do not preclude the trustees from taking action, and I think they do not preclude the beneficiaries from asking the trustees to take action. I concur in what the Lord Ordinary has judiciously done in what I think is the interest of all parties. The accounts will disclose the details of the law-agent's charges, and it will speedily be ascertained whether they are excessive or not by referring them to a competent person to examine them. If they are right, then there is an end of the case. If they are wrong, then I have no doubt that the case will come to an end too by the law-agent, against whom I say nothing, refunding the amount charged in excess. I agree that the interlocutor of the Lord Ordinary should be affirmed.

LORD TRAYNER—I have come to the same conclusion. The purpose of this action is to ascertain whether the beneficiaries have received the full amount to which they are entitled. That being the question, I think the course adopted by the Lord Ordinary is a judicious one, and ought not to be lightly interfered with. The Lord Ordinary's view is this. There are two items in the trustees' accounts which are objected to. If it is found that those two items are correct, there will be no need for any further accounting or for any reduction; if it is found they are not correct, then the Lord Ordinary, inferentially, is of opinion that inquiry ought to be made into these charges, and that such inquiry is not precluded by the discharge. This course is obviously the shortest, the least expensive, and therefore the most desirable for all parties.

But it has been urged upon us that inquiry is excluded by the terms of the discharge. Now, I agree with the general principle that a man who in the full knowledge of his rights grants a discharge is not entitled afterwards to say, "I have made a mistake, and I should not be bound by the discharge which I have signed," and on such a statement to set the discharge aside. But in this case the pursuer does not propose to open up the trust accounts or to challenge them as a whole. He challenges only two items in the accounts which appear *prima facie* to be incorrect. He says to the trustees, "Your duty was to have had these accounts taxed, you did not perform that duty, and I ask you to perform it now." I think the discharge does not preclude the pursuer from taking that position. The trustees' duty, whenever the law-agent's charges were challenged, was to have their account taxed. They did not do so, and I think it should be done now. In this view, the course which the Lord Ordinary has taken is the best way of settling the only matter in dispute in the case, and it can do harm to nobody. I am for adhering to this interlocutor.

LORD MONCREIFF—I am of the same opinion. The only objection to these accounts is as to two items, being charges

by the law-agent which the pursuer alleges are grossly excessive. It has been disclosed that the case in substance is one between agent and client. That being so, the pursuer is no more bound by the formal discharge which he has granted than he would have been by a docketed account. As the trustees will give no facilities, I think the pursuer is entitled to have the law-agent's accounts examined notwithstanding the discharge. In this view the course adopted by the Lord Ordinary is a judicious one, and I am of opinion that his interlocutor should be affirmed.

The Court adhered, and remitted the case to the Lord Ordinary to proceed.

Counsel for the Pursuer and Respondent—Jameson—Graham Stewart. Agents—T. F. Weir & Robertson, S.S.C.

Counsel for the Defenders and Reclaimers—Chisholm. Agent—David Milne, S.S.C.

Tuesday, February 23.

FIRST DIVISION
(COURT OF EXCHEQUER.)

[Lord Stormonth Darling,
Ordinary.

LORD ADVOCATE v. THOMSON AND
ANOTHER.

Stamp—Process—Competency—Stamp Act 1891 (54 and 55 Vict. cap. 39), sec. 53 (2)—Information Laid against Individual Members of a Firm.

Held that an information by the Lord Advocate against the individual partners of a firm of stockbrokers for infringement of the Stamp Act 1891, sec. 53 (2), as amended by the Customs and Inland Revenue Act 1893, sec. 7, in respect of the insufficient stamping of certain alleged "contract notes," was well laid.

Process—Jury-Trial—Court of Exchequer (Scotland) Act 1856 (19 and 20 Vict. cap. 56), sec. 6.

Opinion (per Lord McLaren) that under sec. 6 of the Court of Exchequer Act 1856, when a defender denies the truth in fact of an information lodged against him by the Lord Advocate, the case must be sent for trial to a jury.

The Stamp Act 1891 (54 and 55 Vict. cap. 39), sec. 52 (1), defines the expression "contract-note" as "the note sent by a broker or agent to his principal advising him of the sale or purchase of any stock or marketable security."

Sec. 53 (1) enacts that "Any person who effects any sale or purchase of any stock or marketable security of the value of five pounds or upwards, as a broker or agent, shall forthwith make and execute a contract note and transmit the same to his principal, and in default of so doing shall incur a fine of twenty pounds." (2) "Every person who makes or executes any contract-note

chargeable with duty, and not being duly stamped, shall incur a fine of twenty pounds."

By Schedule I. of the same Act the stamp-duty on a contract-note of the value of £100 or upwards is sixpence.

Sec. 3 (1) of the Customs and Inland Revenue Act 1893 (56 Vict. cap. 7) substitutes a stamp-duty of one shilling for the duty of sixpence imposed by the Stamp Act of 1891.

The Lord Advocate presented an information against William Thomson and John Hutcheson, stockbrokers, Glasgow, carrying on business under the firm name of Thomson, Hutcheson, & Company, for violation of the above-mentioned statutes.

The information contained eight counts, each of which narrated that William Thomson and John Hutcheson, carrying on business as aforesaid, "did both and each or one or other of them," on a specified date, execute a contract-note in respect of the purchase of certain stock on account of a certain principal, which contract-note was a contract-note within the meaning of sec. 52 of the Stamp Act of 1891, and was not duly stamped, being stamped with a duty of one penny only.

The defender Thomson, *inter alia*, denied the averments in each of the counts, and averred that "the action being one of civil jurisdiction, it should be directed against Thomson, Hutcheson, & Company."

The defender Hutcheson referred to the alleged contract-notes for their terms, and proceeded—"Denied that the advices were contract-notes within the meaning of 54 and 55 Vict. cap. 39, or are contrary to the Statutes 54 and 55 Vict. cap. 39, secs. 1 and 53 (2), and 56 and 57 Vict. cap. 7, sec. 3. Explained that the business was conducted on what is known as the 'cover system.' There was no stock purchased for or on behalf of any such person as" the alleged principal, "and there never was any sale or purchase of any marketable security, as defined in sec. 53 of 54 and 55 Vict. cap. 39. In any event, the action being one of civil jurisdiction, it should be directed against Thomson, Hutcheson, & Company."

The defender Thomson pleaded, *inter alia*—" (2) The action is incompetent, *et separatim*, it is irrelevant. (2) All parties not called."

The defender Hutcheson also proponed these pleas, numbering them 1 and 2.

On 5th January 1897 the Lord Ordinary (STORMONTH DARLING) found for the pursuer upon each of the eight counts of information, subject to the declaration that the pursuer should not be entitled to recover more than one fine of £20 sterling under each count; and therefore adjudged the defenders, jointly and severally, to forfeit and pay to the pursuer a sum of £160.

Opinion.—"The defence to this suit for penalties under the Stamp Act is twofold—(1) That the information is badly laid as being directed against the individual partners of a firm without calling the firm itself; and (2) that the documents said to have been insufficiently stamped are not contract-notes within the meaning of the