Lord Ardmillan—I am of the same opinion. The question whether the fund was divisible into four or five parts depended on the question whether William Henry Graham had a good claim or not. If his claim was not good, the estate was divisible into four parts, and, if good, into five. Frederick Graham's trustees appear to have concurred with William Henry Graham in his view of his rights, and therefore claimed one-fifth. Humphrey Graham and the others declined to recognise William Henry's right, and claimed one-fourth. That was not done by inadvertence, but advisedly, and there is no ground for now going back upon the claims.

Agents for F. Graham's Trustees—Maconochie & Hare, W.S.

Wednesday, May 27.

COCKBURN AND OTHERS *v.* WATSON AND ANOTHER.

Title to Sue—Promissory-note—Creditor—Advocation—Competency. Action for payment of the sum in a promissory-note *dismissed*, the pursuer not averring any title.

William Watson and William Wilson, sometime preses and secretary of "The Brisbane Place Benevolent Society," Kelso, brought this action, in the Sheriff-court of Roxburghshire, against Cockburn and others, members of the said society, concluding that the defenders ought to be decerned, conjunctly and severally, "to pay to the pursuers the sum of £100 sterling, being the amount of a promissory-note, dated at Kelso the 29th day of December 1864 years, payable five months after date, granted to the Bank of Scotland by William Townley, residing in Kelso, treasurer to said society, and as a member thereof, and the said William Watson, as secretary to said society, and as a member thereof, and the said William Wilson, as preses of said society, and as a member thereof for the years 1864 and 1865, for behoof of the whole members of said society, and which sum of £100 sterling was paid over by the pursuers to the said defenders and others, members of said society for the years 1864 and 1865, but whose names are not known to the pursuers, the said James Walker, defender, who acts as present secretary to the society, and is in possession of the books thereof, having refused access to the said books, or to give a list of the names of the members; but which sum the said defenders refuse to pay to the pursuers, with expenses," etc.

The pursuers, in their condescendence, alleged (Cond. 10), that "The society having failed to pay said promissory-note when it became due on the 1st of June last, and the bank having raised diligence thereon, the pursuers instructed proceedings against the society, but as it was not incorporated, nor had taken the benefit of the Friendly Society Acts, and the whole members (consisting of upwards of 300) not known to the pursuers, their procurator applied to the secretary of the said society for the names of the office-bearers, committee, and members thereof, explaining that the object in making the request was to enable the pursuers to bring an action against the society for said bill of £100, and stating that, unless an answer was returned within two posts, it would be taken as granted that the society declined to comply with the request. To this letter, which was received by the secretary and laid before the society, no answer was returned." (Cond 11). "No other course was then left to the pursuers than to raise an action against the members of said association, so far as known to them."

After various procedure in the Sheriff-court, including the raising of a supplementary action in consequence of a plea by the defenders that all parties were not called, the Sheriff, recalling the judgment of the Sheriff-substitute, pronounced this interlocutor:—"Finds that the members of the society in the year 1865 benefitted by the proceeds of the bill, the amount of which is pursued for, and therefore decerns against the defenders in this and the supplementary process; and, in absence, against those who have been summoned and not entered appearance in their respective proportions of the said bill, deducting the sums for which those not summoned; for which reserves to the pursuers recourse against them, and remits to the clerk to make up a state showing the sum due by each member during said year: Finds the defenders liable in expenses in their respective proportions, and allows an account to be given in to be taxed, and decerns."

The defenders advocated.

The respondents, besides pleas on the merits, pleaded that, the whole merits of the cause not having been disposed of, the advocation was incompetent.

The Lord Ordinary (Ormidale) repelled the preliminary plea, and, on the merits, dismissed the action at the instance of the respondents (pursuers in the Inferior Court), and found them liable in expenses, adding this note:—"The only ground on which it was contended by the respondents that this cause had not been exhausted, and no judgment pronounced in the Sheriff-court 'disposing of the whole merits of the cause,' in terms of section 24 of the Sheriff-court Act 16 and 17 Vict., c. 80, and that therefore the advocation was incompetent, was, that the Sheriff's last interlocutor of 6th November 1866 contains a remit to the clerk to make up a state showing the precise sum due by each defender. But, looking at the whole interlocutor, and the decernitures embodied in it, as well as the Sheriff's relative explanatory note, the Lord Ordinary thinks the interlocutor referred to must be held, in all substantial respects, and in every reasonable sense, such a final and exhaustive judgment in regard to the merits of the cause as to render the advocation competent. It will be observed that the Clerk is not directed to report the state to be prepared by him to the Court, and probably all that was meant was that he should perform the arithmetical apportionment of the defenders' liabilities as decerned for, to facilitate the extracting of the decree, instead of leaving that more piece of form—for it was little, if anything more—to be attended to by the extractor himself; or, perhaps, the clerk is himself extractor. A great many cases were cited in argument, having some bearing on the question of competency, but none of them exactly in point, and none of them, indeed, appear to have occurred under the Act 16 and 17 Vict., cap. 80.

"Assuming the advocation to be competent, it is obvious that the Sheriff has fallen into a mistake in deciding the cause, on its supposed merits, against the advocators (defenders in the Sheriff-court), without hearing them, or giving them an opportunity of being heard, and without a proof or inquiry of any kind. The Lord Ordinary thinks it also clear that the actions, original and supple-

mentary, as laid by the respondents (pursuers in the Sheriff-court), are quite irrelevant and untenable. They are laid on a promissory-note, and conclude for payment of its contents; but it is not even averred that the pursuers (respondents) are *in titulo* of the promissory-note, or creditors for its contents. Their own statements are inconsistent, rather than otherwise, with that assumption. On this ground, as well as others referred to by the Sheriff-substitute in the note to his interlocutor of 22d January 1866, the Lord Ordinary thinks that he rightly dismissed the pursuers' action, and the Lord Ordinary has, in effect, repeated the Sheriff-substitute's judgment."

The respondents reclaimed.

HALL (J. C. SMITH with him), for reclaimers, did not press the plea of incompetency, but argued the case on the merits.

PATTISON and BURNET, for Cockburn and Others, were not called on.

At advising—

LORD PRESIDENT—The conclusion of this summons is [*reads conclusion*]. I don't think there is anything incompetent in that conclusion; but then, to enable a party to insist as pursuer in such a conclusion, he must put himself in one of two positions in respect of title. He must either show that, being the original debtor to this promissory-note, he became the creditor, or at least acquired a title to the note itself from having retired it, or in some other way; or he might show that he had retired it with his own funds, and that the proceeds when discounted have been applied for behoof of the defender, and then he would have had a good action of debt. But when we look at the condescendence in the Inferior Court, and look for an allegation of title, we look in vain. It is not said that they did from their own funds retire it when due, or that they had a title in any other way. On the contrary, as Lord Deas said, not only is there an absence of any averment that this note was retired from their own funds, but there is something very like a careful avoiding of such averment, creating some suspicion of want of good faith. But it is clear that they desired to avoid a statement of title, for in the supplementary action they had another opportunity of making the matter plain, and yet in that condescendence too there is the same absence of any allegation sufficient to found a title to sue. For these reasons I think we ought to adhere. I don't quite agree with the Lord Ordinary in his view as to the relevancy, but he is right in his conclusion.

LORD CURRIEHILL concurred.

LORD DEAS—A statement that these two parties granted the bill and got the money for behoof of the members of the Society, and then applied it for their behoof, would be sufficient to entitle them to insist in this action, if they were really the parties who retired the bill. But it was not granted by them alone, but by the treasurer also for behoof of the society, so that the possession of the bill by them does not let us know whether it was not retired by the treasurer, without any allegation that they retired it from their own funds. On looking at the conclusions of the first action they are apt to impose on one, and at first sight they imposed on me; for it looks as if it was meant that the pursuers had on their own responsibility and from their own funds paid that sum to the different members. But it is plain that that is not the real meaning of the pursuers from the very conclusions of the summons. It only means that the money was got and paid over, but has no reference to the retirement of the bill; and that is clear from the statements in the record. In the supplementary action it is still clearer that the pursuers avoid the question; for articles 10 and 11 cannot be read without seeing that they purposely refrain from stating a title. They say that the bill was granted, and that the bank raised diligence on it, and then they applied for the names of the members to enable them to raise an action against them. But it is clear that they avoid saying how they got the bill. They jump from the statement that the bank threatened diligence, to this, that they then brought an action, without any intermediate step. The statements on the record are purposely vague and irrelevant, and it would only be creating expense to the parties to allow an amendment of the record, even if that were competent.

LORD ARDMILLAN—I am not sure whether, if it were pleaded that there had been an accidental omission of the statement, that the bill had been retired with the funds of the pursuers, it might not have been competent to permit an amendment. If it was clearly an omission, the parties might have caused that to be stated at the bar. But it is plain that counsel are in *bona fide* ignorance of the fact, while there has not been *bona fides* on the part of the party sending them here. The party entitled to sue is the party who paid the bank and obtained the right to sue. But the pursuers not only have not made any statement to that effect, but in the 10th article they avoid that question, and entirely omit, between the statement as to the bank having raised diligence and the statement of their bringing the action, any averment of their right to the bill; and even now, at the bar, they do not propose to add any such averment.

Adhere.

Agent for Reclaimers—James Somerville, S.S.C.

Agent for Respondents—William Mason, S.S.C.

Wednesday, May 27.

NORTH BRITISH OIL AND CANDLE CO. (LIMITED) *v.* SWANN.

Agreement—Construction. Held, on construction of agreement between manufacturers of oil and a coalmaster, that the latter was only bound to supply coal to the former for the purposes of their manufacture.

In 1865 the pursuer entered into an agreement with the defender James Swann, lessee of a coal field at Riggside, for supply of coal and coal tripping. The agreement bore that "whereas the said company are erecting certain buildings and works at or near Lanark, North Britain, for the purpose of manufacturing paraffin burning oils and other products from petroleum coal or shale: And whereas the said James Swann is desirous of supplying the said company with cannel or oil coals for the purposes of their manufacture from his coal pits situate at Riggside . . . . the said James Swann doth hereby agree to supply in every week to the said company, and the said company do hereby agree to receive in every week from the said James Swann, as much cannel or oil coal as the said company shall require, but so that the quantity to be supplied in any one week shall not be less than 75 tons of 20 hundredweight each ton, or more than 150 tons of 20 hundredweight each ton: And also any quantity of coal-tripping which the